Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

JAMES J. TRAVERS
Petitioner,

v.

VERNON JONES, Individually and in his Official Capacity as Chief Executive Officer of Dekalb County, Georgia; and SCOTT B. WILDER, Individually and in his Official Capacity as Fire Chief of Dekalb County, Georgia,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Court of Appeals failed to follow binding Georgia precedent in determining the collateral estoppel effect of an unreviewed administrative hearing which conflicts with the Court's decisions in *Tennessee v. Elliot*, 478 U.S. 788, 106 S.Ct. 3220 (1986) and *Fidelity Union Trust Co. et al v. Field*, 311 U.S. 169, 61 S.Ct. 176 (1940)?

II. Whether the Court of Appeals wrongly expanded the Court's holding in *Tennessee v. Elliot*, 478 U.S. 788, 106 S.Ct. 3220 (1986). by holding that a "just cause" finding from an unreviewed administrative hearing bars subsequent litigation of a First Amendment retaliation claim in federal court?

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case. DeKalb County, Georgia, is a party in the underlying action, but was not a party to the interlocutory appeal considered by the Court below. There is no parent or subsidiary company of any party to be listed.

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Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner, James J. Travers, respectfully petitions for a writ of certiorari for review of the opinion judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 323 F.3d 1294 and is reproduced in the Appendix filed herewith ("App.") at App. A, 1a. The Table Opinion of the Court of Appeals denying Petitioner's application for Rehearing and Rehearing en Banc appears at — F.3d — (TABLE NO. 02-14043) and is reproduced at App. B, 8a. The unreported decisions of the district court denying Respondents' motions for summary judgment are reproduced at App. C, 9a and App.

D, 12a. The decision of the administrative hearing officer from the Merit Board hearing is reproduced at App. E, 26a.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment reversing the District Court's decision in favor of Petitioner on March 11, 2003 and denied Petitioner's application for Rehearing and Rehearing en Banc on May 29, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This appeal involves the First Amendment to the United States Constitution, that provides, *Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people to peaceably assemble, and to petition the Government for redress of grievances.*

This appeal also involves the Fourteenth Amendment to the United States Constitution, that provides, *"[. . .] No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."*

This appeal further involves 42 U.S.C. § 1983, that provides, *"Every person who, under color of any statute ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . ."*

STATEMENT OF THE CASE

Petitioner is a firefighter employed by DeKalb County and assigned to its Fire Department. (App. D, 13a). He was also a Trustee of the local firefighters union, known as DeKalb

Professional Firefighters, Local 1492, the local chapter of the International Association of Firefighters. Petitioner regularly participated in Union activities during the 2000 election for DeKalb County's highest office, the Chief Executive Officer, [CEO]. Respondent Vernon Jones ultimately won a contentious election after a run off. Local 1492 initially opposed Jones' candidacy, but supported him during the run off. Nevertheless, Jones did not soon forget Local 1492's support of one of his opponents.

His animosity for Local 1492 grew when the firefighters began to picket the county's courthouse, protesting a new pay system. Under Jones' new pay plan, higher salaries were offered to entry level employees, without any proportional increase in the compensation of long term employees. Long-term employees of higher rank were paid less than short-term lower ranking employees. Union members, including Petitioner, took to the picket lines on their off days to protest the new pay plan. (App. D, 13a).

During the daily picket protests outside the Maloof Administration Building—the seat of DeKalb County's government —the firefighters chanted: "Vernon, Vernon, what do we want? Equal pay for equal work. When do we want it? Now!" (App. D, 13a). On at least two occasions, Jones openly displayed his frustration and anger over the protests by confronting the firefighters. On one occasion, he threatened to bring his five brothers to the scene so that the matter could be settled once and for all. On another occasion Jones taunted the firefighters, who carried hand lettered signs, asking whether "handicapped people had made their signs." Throughout the protest, Jones repeatedly told officials with the union that he would never address their grievance plan issue because the union had "backed the wrong horse" during the campaign. Jones also plainly disliked the daily television reports about the firefighters' organized picketing so early in his tenure as CEO.

On May 14, 2001, Travers was the *only* firefighter on the picket line.[1] Marching alone, Travers held a sign that read, "Equal Pay For Equal Work/Honk For Firefighters." [App. D, 13a]. When Travers saw Jones exit the Maloof Building, he began to chant the now familiar refrain of the protest. He did not get past the first two words: "Vernon, Vernon . . ." (App. D, 13a). Hearing a lone protestor with the courage to chant his political views incensed Jones. He walked rapidly up to Travers and, visibly angry, wagged his finger in Travers' face as he shouted that Travers had "no business being out there" and was being "insubordinate." [App. D, 14a]. Jones then wheeled around and stalked off, sending a police officer over to get Travers' name. Three days later, DeKalb County Fire Chief Scott Wilder suspended Travers for thirty (30) days without pay for "Insubordination" and "Conduct Unbecoming On/Off Duty" because of his activities during the May 14, 2001 protest. (App. D, 14a).

Petitioner contended the suspension was nothing more than a blatant act of retaliation against his (and his union's) participation in a lawful public protest. Petitioner filed a lawsuit in the United States District Court for the Northern District of Georgia on June 29, 2001, alleging a violation of his First Amendment rights. He also appealed his suspendsion through DeKalb County's Merit System. *Four months* after Travers filed his lawsuit in District Court, DeKalb County granted Travers a hearing on his appeal. (App. D, 15a).

Merit appeals in DeKalb County are heard by an administrative hearing officer "selected from the Hearing Officer pool *established by the Chief Executive Officer*"—Vernon Jones. (App. H, 40a). To serve as a hearing officer, a person need only have a) a Baccalaureate degree and three (3)

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[1] The Court of Appeals wrongly states that Travers was picketing with "a group of other firefighters." [App. A, 2a].

years experience reviewing employment grievances *or* b) be a lawyer with at least two (2) years of experience in the practice of law. (App. H, 40a-41a). "The Hearing Officer is not bound by strict courtroom procedures as is normal for a judicial hearing." Upon request by the *appellant*, the Merit System Director "shall only be responsible for notifying *current County employees* that their attendance is requested, but *cannot compel the attendance of the requested witnesses.*" No procedure exists for securing attendance of non-County employees as witnesses. The County "shall have the *right to both open and close . . . closing argument.*" After the parties present their cases, the *County* has "the right to introduce *rebuttal evidence . . . includ[ing] . . . unidentified . . . documents or . . . witnesses.*" The employee cannot present rebuttal evidence or any evidence that has not been previously disclosed to the County. The Hearing officer may only reverse the action "*upon a finding that the action was based upon an error in fact or was motivated by a non job-related factor.*" There was no provision for judicial review of the Hearing Officer's decision outside the County bureaucracy that ultimately reports to Vernon Jones.

Petitioner testified at his hearing, but two County employees he had notified to appear as witnesses declined to attend. They were no doubt fearful of testifying against the CEO, particularly after seeing what had happened to Petitioner. When Petitioner complained about the absence of his witnesses, the hearing officer reminded him that ". . . [t]here is no subpoena power. So we don't have any knowledge as to whether or not those two people will be here or not."[2] The

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[2] The Court of Appeals wrongly blamed Travers' tardy request for the absence of his witnesses. (App. F, 30a-31a) Travers' witnesses, DeKalb County Police Officer Gail Karabeika and Vernon Jones, were notified. Karabeika did not attend because the *county attorney's office* told her

Hearing Officer affirmed Petitioner's suspension based solely on the following findings of fact:

- On May 14, 2001, at around 9:00 a.m. the appellant was outside in front of the Maloof Administration Building participating in a picket demonstration.
- As CEO, Vernon Jones exited the building, the appellant turned to Mr. CEO [3] and in a loudly, (sic) menancingly (sic) and taunting manner began to repeatedly chant Mr. CEO's first name, "Vernon . . . Vernon."
- Mr. CEO approached the appellant and inquired whether he was a County employee. The appellant acknowledged that he was a County employee exercising his rights as a citizen. Mr. CEO told the appellant that while he did not mind that he was exercising his rights, he would not tolerate his insubordinate actions. The appellant then said that he (the appellant) needed to take off his sunglasses so that he (the appellant) could look into Mr. CEO's eyes.

Travers' testimony at the hearing directly contradicted these findings but, with no ability to offer any corroborating witnesses, Travers did not have a fair opportunity to challenge Jones' version of events. Fatally handicapped by an administrative process that virtually guaranteed a favorable outcome for the County, Travers' defeat was a foregone conclusion.

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not to appear. Jones, meanwhile, did not appear because it "wasn't on [his] schedule."

[3] Unbeknownst to Petitioner on May 14, 2001, Vernon Jones had issued a bizarre order requiring that all DeKalb County employees address him as "Mr. CEO."

Petitioner faced no such arbitrary restrictions in federal court. Karabeika, among others, testified by deposition and flatly contradicted the findings of the hearing officer. Officer Karabeika was assigned to monitor the picket on May 14, 2001. She testified that Jones was the aggressor during the confrontation with Travers and that Travers did not appear to be menacing or taunting to Jones. Officer Karabeika also offered testimony critical to establishing Jones' retaliatory motive. She testified that Jones' assistant demanded that she get Travers' name shortly after the incident "because Jones wanted it." She also testified that Scott Wilder never bothered to get her version of events before he punished Travers. Tee Okenkwo, a local attorney, also witnessed the events.[4] Mr. Okenkwo testified that Travers was not threatening, hostile or aggressive towards Jones. Mr. Okenkwo never saw Travers make any gesture or use any language that could be construed as insubordinate, rude or disrespectful. Instead, Mr. Okenkwo corroborated that Jones got within two feet of Travers, wagged his finger in his face, and shouted at him that "he had no business being there."

Despite such evidence, Respondents nevertheless moved for summary judgment, alleging in part that the hearing officer's fact findings were binding upon the District Court. The District Court disagreed and, after Respondents moved for reconsideration, explained its rationale:

> . . . [T]his court stated that there were conflicting accounts as to what actually transpired on the morning of May 14, 2001. *This is because of what might be described as the procedural inadequacies of such a hearing.* [. . .] Because the plaintiff was unable to present all of his witnesses and because the hearing

[4] As Mr. Oknowko is not a county employee, Travers' had no way of compelling his attendance at the Merit Board hearing despite the fact that he was a neutral eye witness to this event. The hearing officer has no subpoena power.

> officer could only reverse the decision of the department head in certain instances, *the court hereby holds that DeKalb County Merit System fails to provide the plaintiff with . . . 'meaningful administrative review' of his disciplinary action . . .*

The District Court also denied qualified immunity to Jones and Wilder, so they filed an interlocutory appeal with the Court of Appeals on the qualified immunity issue. The Court of Appeals accepted interlocutory jurisdiction over Respondents appeal of the *denial of qualified immunity* pursuant to the "collateral order" doctrine and *Mitchell v. Forsyth*, 472 U.S. 511, 528, 105 S. Ct. 2806, 2816 (1985). The Court of Appeals reversed and granted qualified immunity, but only after reviewing, *sua sponte*, the District Court's failure to give preclusive effect to the administrative hearing officer's findings of fact. The Court of Appeals acknowledged that "there was a sharp conflict between the plaintiff and the defendants as to what transpired at that time" and concluded that "the merits of the case turn on whether the plaintiff's or the defendants' version of the facts is correct." (App. A, 3a). Importantly, the Court of Appeals acknowledged that, absent issue preclusion, Respondents Wilder and Jones would not be entitled to qualified immunity at the summary judgment stage. (App. A, 3a). The Court of Appeals granted qualified immunity *solely* because the factual determinations of the hearing officer were binding and determinative of Travers' First Amendment claims. (App. A, 7a).

Travers filed this case, *before his Merit Board Hearing*, to vindicate his right—a right shared by all public employees in the United States—to publicly protest against his public employer without fear of retaliation. By ignoring binding Georgia precedent and wrongly extending the Court's decision in *Univ. of Tennessee v. Elliot*, 478 U.S. 788, 106 S.Ct. 3220 (1986), the Court of Appeals has now effectively barred access to the federal courts to all public employees in Georgia

who, like Travers, pursue administrative remedies offered by their employers before burdening the federal courts with their civil rights lawsuits. On behalf of himself and all of Georgia's public employees, Petitioner asks that the Court grant certiorari and reverse the judgment of the Court of Appeals.

REASONS FOR GRANTING CERTIORARI ARE SUBSTANTIAL

The issues presented for review involve two fundamental benchmarks of federal jurisprudence: 1) deference to state courts on issues of state law, *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817 (1938); and 2) unfettered access to the federal courts for citizens seeking redress through 42 U.S.C. § 1983 for violations of their constitutional rights, *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473 (1961).[5] The Court of Appeals abandons these benchmarks of our jurisprudence and creates an untenable, wholly unnecessary friction between the administrative and judicial remedies available to Georgia' public employees when their employers violate their federal constitutional rights. In short, the Court of Appeals "has so far departed from the accepted and usual course of proceedings . . . as to call for an exercise of this Court's supervision." *Florida v. Rodriguez*, 469 U.S. 1, 7, 105 S.Ct. 308 (1984) (Stevens, J. dissenting).

This Court has repeatedly emphasized the duty of federal courts to faithfully apply state law where deciding a matter controlled by state law. *Russell v. Todd*, 309 U.S. 280, 60 S.Ct. 527 (1940); Rules of Decision Act, 28 USC § 1652. Where a federal court refuses to follow binding precedent of

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[5] "The 1871 Congress intended § 1 to '*throw open the doors of the United States Courts*' to individuals who were threatened with, or who had suffered, the deprivation of constitutional rights and to provide these individuals immediate access to the federal courts notwithstanding any provision of state law to the contrary." *Patsy v. Board of Regents of the State of Florida*, 457 U.S. 496, 503, 102 S.Ct. 2557 (1982), *quoting* Rep. Lowe, Cong. Globe, 42d Cong., 1st Sess., 376 (1871).

an intermediate State Court, the Court will grant certiorari to preserve the dual objectives of comity and federalism. *Fidelity Union Trust Co. v. Field*, 311 U.S. 169, 61 S.Ct. 176 (1940); *Exxon Co., U.S.A. v. Banque de Paris et des Pays Bas*, 488 U.S. 920, 109 S.Ct. 299 (1988); *Gooding v. Wilson*, 405 U.S. 518, 526 n.3, 92 S.Ct. 1103 (1972). Petitioner presents such a circumstance here as the Court below failed to follow *Flournoy v. Akridge*, 198 Ga. App. 86, 400 S.E.2d 649 (1990) *cert. denied* (Jan. 10, 1991), the controlling Georgia authority as to the collateral estoppel effect of an unreviewed state administrative hearing in subsequent civil rights litigation.

Moreover, the Court will accept certiorari where the decision below is incorrect and decides a matter of significance to our jurisprudence. *Edwards v. South Carolina*, 372 U.S. 229, 230, 83 S.Ct. 680 (1963); *Pointer v. Texas*, 380 U.S. 400, 401, 85 S.Ct. 1065 (1965). The issue at stake here is the continued viability of civil rights claims filed by public employees against their employers in Georgia. The Court of Appeals has wrongly extended *Elliot* in two ways. First, the Court of Appeals has interpreted *Elliot* to mean that even where a state court would not give preclusive effect to an administrative decision, the federal courts may. Second, the Court of Appeals has extended *Elliot*'s limited holding to bar access to federal courts to public employees who pursue limited administrative review of "just cause" determinations. Without review, the decision below will effectively deny access to a fully and fairly litigated civil rights claim in federal court; unless employees forgo the administrative process, public employers armed with the decision below will use administrative hearings to summarily dispose of federal civil rights claims by their aggrieved employees. Thus, Travers seeks certiorari on behalf of all Georgia's public employees, respectfully requesting that the Court reverse the decision of the Court of Appeals and reaffirm the fundamental principles of our jurisprudence threatened by this decision.

I. COMITY DEMANDS THAT THE COURT OF APPEALS FOLLOW BINDING GEORGIA PRECEDENT IN APPLYING GEORGIA LAW.

In its opinion, the Court of Appeals glossed over the Court's well-established test for deciding whether the fact findings of an unreviewed State administrative body will be binding in a federal proceeding. *See Tennessee v. Elliott*, 478 U.S. 788, 106 S. Ct. 3220 (1986); *United States v. Utah Construction and Mining Co.*, 384 U.S. 394, 86 S.Ct. 1545 (1966). *Elliott* holds that: "*when a state agency acting in a judicial capacity . . . resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, federal courts must give the agency's fact finding the same preclusive effect to which it would be entitled in the State's courts.*" *Elliot*, 478 U.S. at 799. *Elliot* requires a federal court to look first to State collateral estoppel law, thereby implicating core principles of comity and federalism embodied in the Court's opinion in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817 (1938), and thereafter consider whether the administrative hearing "satisfied the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause." *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 481, 103 S.Ct. 1883 (1982).

Where the state law supplies the rule of decision, fundamental principles of comity inform a federal court's inquiry. The highest court of the state is the final arbiter of what is state law; however, the duty of the federal court "to ascertain and apply state law" remains "even though it has not been expounded by the highest court of the state." *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 at 78; *Fidelity Union Trust Co. v. Field*, 311 U.S. 169, 177, 61 S.Ct. 176 (1940).

> Where an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is datum for ascertaining state law which is not to be disregarded by a federal court unless it is

> convinced by other persuasive data that the highest court of the state would decide otherwise.

West et al v. American Telephone & Telegraph Co., 311 U.S. 223, 237, 61 S.Ct. 179 (1940).[6]

The Court has applied the holding in *Fidelity, supra,* to its cases involving matters of Georgia law. In *Gooding v. Wilson,* 405 U.S. 518, 92 S.Ct. 1103 (1972), the Court determined the constitutionality of a criminal statute in Georgia. In its review of Georgia law, the Court noted that "the Court of Appeals of Georgia is a court of statewide jurisdiction, the decisions of which are binding upon all trial courts in the absence of a conflicting decision of the Supreme Court of Georgia. Federal courts must therefore follow these holdings as to Georgia law. . ." *Gooding,* 405 U.S. 518, at 526, n. 3; *See also* Ga. Const. Art. 6, §5, ¶2; *Allen v. Bergman,* 201 Ga. App. 781, 412 S.E.2d 549 (1992); ("the decisions of the Court of Appeals in so far as not in conflict with those of the Supreme Court shall bind all courts except the Supreme Court as precedents"). The Court has routinely granted certiorari, reversed and remanded decisions of the federal appellate courts when the rule announced in *Fidelity* is ignored by the court below. *See Exxon Company, U.S.A. v. Banque de Paris et des Pays-Bas,* 488 U.S. 920, 109 S.Ct. 299 (1988). The Court should likewise grant certiorari here as the Court of Appeals ignored binding Georgia precedent in concluding that the facts determined in an unreviewed administrative hearing are binding in a citizen's federal

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[6]The Court decided *Fidelity Union Trust Co., supra, West, supra,* and *Six Companies of California et al v. Joint Highway Dist. No. 13 of the State of California,* 311 U.S. 180, 61 S.Ct. 186 (1940) on the same day. *Fidelity Union Trust Co.* and *Six Companies* extended the rule in *West,* "*. . . we set forth the broader principle as applicable to the decision of an intermediate court, in the absence of a decision by the highest court, whether the question is one of state or common law.*"*Fidelity,* 311 U.S. at 178.

litigation for constitutional violations brought under 42 U.S.C. § 1983.

A. The Georgia Court of Appeals' Decision in *Flournoy v. Akridge* is Binding Precedent as to the Preclusive Effect of Unreviewed Administrative Hearings in Federal Civil Rights Cases.

In *Flournoy v. Akridge*, 198 Ga. App. 86, 400 S.E.2d 649 (1990), the Georgia Court of Appeals decided the precise issue that confronted the circuit court, yet the circuit court inexplicably refused to follow *Flournoy*. Instead, the circuit court created a "federal" law of collateral estoppel for Georgia civil rights cases.

Flournoy involved a public employee who appealed his discharge to a state administrative body. After the discharge was affirmed, the employee brought a §1983 action in state court alleging race discrimination as the true motive for his termination. The trial court granted summary judgment to the employer because it believed the administrative hearing officer's findings of fact were binding in the employee's §1983 race claim. The Court of Appeals reversed and held:

> The hearing officer was entertaining a state administerative claim and the case before us is based upon an entirely separate cause of action grounded in the federal statute. The fact finding process in the administrative procedure was geared toward proof of the administrative cause of action and was not necessarily the same as the fact finding process necessary to a full and proper litigation of appellant's Section 1983 claims. Therefore, we determine that we are not bound to accept the administrative hearing officer's findings of fact as undisputed.

Flournoy, 198 Ga. App. at 88. In reaching its decision, the Georgia Court of Appeals was mindful of the Court's

decision in *Elliot v. Tennessee*, *supra*, and explained that, "the fact finding process in a § 1983 action is unique to the cause of action such that ***the appellant did not have the opportunity to litigate necessary facts and issues to that claim in an administrative hearing geared toward an entirely separate cause of action.***" *Flournoy*, 198 Ga. App. at 88. The Georgia Court of Appeals held that fact findings from an unreviewed stated administrative hearing conducted by a public employer did not operate as collateral estoppel upon an employee's subsequent litigation of federal constitutional rights.

Flournoy is the law in Georgia. *Flournoy* has never been overruled, criticized or substantially modified in subsequent Georgia cases. *See Francis v. Reynolds*, 215 Ga. App. 418, 450 S.E.2d 876 (1994) (treating dental board findings as outcome determinative in subsequent malpractice litigation would "impermissibly invade the province of the jury."); *Swain v. State*, 251 Ga. App. 110, 552 S.E.2d 880 (2001) (findings of administrative license suspension not binding in subsequent D.U.I. prosecution because State did not have full and fair opportunity to litigate); *Block v. Woodbury*, 211 Ga. App. 184, 438 S.E.2d 413 (1993)(no collateral estoppel where issue not actually determined in first proceeding). But instead of applying binding precedent, the court below erroneously interpreted Georgia law by relying on two entirely distinct decisions of the Georgia Court of Appeals, *Jordan v. Board of Public Safety*, 253 Ga. App. 339, 559 S.E.2d 94 (2002); and *Blackwell v. Georgia Real Estate Comm'n*, 205 Ga. App. 233, 421 S.E.2d 716 (1992).

Blackwell does not involve collateral estoppel, but addresses the res judicata effect of an administrative hearing.[7]

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[7]This Court recognized the important distinction between res judicata (claims preclusion) and collateral estoppel (issue preclusion). *Kremer v.*

Blackwell, 205 Ga. App. at 234. The Georgia Real Estate Commission revoked Blackwell's license at a real estate license revocation hearing. Blackwell appealed and sought a stay in Superior Court. The Superior court affirmed the revocation and denied the stay. Blackwell then filed a separate lawsuit challenging his revocation and requested a stay. The Court of Appeals held that "[a]ppellant has previously litigated these claims and cannot now re-litigate his assertion of error by appellee and his request for a stay of appellee's decision." *Id.*

As *Blackwell* involved a *judicially reviewed* administrative hearing, its holding plainly has no significance here. *See Shields v. BellSouth Advertising*, 273 Ga. 774, 545 S.E.2d 898 (2001)(findings of fact from an administrative hearing subjected to judicial review are entitled to preclusive effect). The Georgia Court of Appeals specifically rejected extending res judicata to unreviewed administrative hearings in *Flournoy*, "[i]n the instant case, our state courts have not had the opportunity to review the hearing officer's findings on direct appeal, and in the absence of such review, we do not find this federal precedent persuasive." *Flournoy*, 198 Ga. App. at 88 citing *Gorin v. Osborne*, 756 F.2d 834 (11th Cir. 1985) ("reviewed administrative hearing in Georgia entitled to preclusive effect in subsequent federal civil rights litigation").

Furthermore, *Jordan v. Board of Public Safety*, 253 Ga. App. 339, 559 S.E.2d 94 (2002), (hereinafter "*Jordan II*"), unlike *Flournoy*, has no precedential value in Georgia. *Jordan II* was decided two months after the Court of Appeals decided *Board of Public Safety v. Jordan*, 252 Ga. App. 577,

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Chemical Construction Corp., 456 U.S. 461, 467-68, n. 6, 102 S.Ct. 1883 (1982).

556 S.E.2d 837 (2001), (hereinafter "*Jordan I*"). In *Jordan I*, the Court of Appeals reversed a jury verdict in favor of Jordan because the defendants were entitled to sovereign immunity. *Jordan I*, 252 Ga. App. at 585. As a result, the Court of Appeals did not "need to address the . . . remaining enumerations of error, including the collateral estoppel argument." *Id.* at 586. Despite its holding in *Jordan I*, the Court of Appeals issued what appears to be a purely advisory opinion in *Jordan II* and held that Jordan was bound by fact determinations reached at his administrative appeal of his termination. *Id.* at 341-42. The court below overlooked *Jordan II*'s procedural complications and wrongly relied on an advisory opinion to fashion its own rule of collateral estoppel in Georgia.

The Court should not conclude that *Jordan II* conflicts with *Flournoy*, thereby excusing the Court of Appeals' interpretation of Georgia law.[8] Jordan challenged his termination from the Board of Public Safety primarily on state law grounds, along with a meritless federal substantive due process claim. His claims implicated none of the funda-mental constitutional rights inherent in § 1983 litigation, such as the First Amendment rights at stake here. In short, the Court of Appeals in *Jordan II* did not consider its decision in *Flournoy* because it was inapplicable to the facts presented in *Jordan II*. *Flournoy* remains the law in Georgia as to whether factual determinations from an *unreviewed* administrative hearing will have preclusive effect over subsequent § 1983 litigation filed by a public employee against his public employer.

Elliot teaches that the inquiry into a given state's law of collateral estoppel is not a trifling matter, but embodies the very underpinnings of our framework of government. The Court should therefore grant certiorari where, as here, a

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[8] Even if *Jordan II* did conflict with *Flournoy*, the circuit court was required to follow *Flournoy*. *See Gooding v. Wilson*, 405 U.S. 518, 526, n.3 92 S.Ct. 1103 (1972)

federal court has completely failed to properly perform its constitutional function in our federal system by jettisoning state law in favor of its own interpretation of what the law aught to be. *Fidelity*, 311 U.S. 169, at 177; *Exxon USA*, 488 U.S. 920.

B. Even in the Absence of *Flournoy v. Akridge*, the Decision Below Conflicts with Georgia's Collateral Estoppel Law.

Administrative decisions may have a collateral estoppel effect in a subsequent judicial proceeding under Georgia law when four requirements are met: (1) both proceedings must involve the same parties or their privies; (2) the issue must have been actually litigated; (3) that determination must have been essential to the judgment; and (4) the party against whom the doctrine is asserted must have had a full opportunity to litigate the issue in question." *Swain v. State*, 251 Ga. App. 110, 552 S.E.2d 880 (2001); *Butler v. Turner*, 274 Ga. 566, 555 S.E.2d 427 (2001). Thus, even in the absence of *Flourney v. Akridge*, 198 Ga. App. 86, 400 S.E.2d 649 (1990), Georgia law would not afford preclusive effect to the fact findings of an administrative body such as the one at issue in this case.

None of the individual Respondents were parties at the administrative hearing—the only parties were Travers and the DeKalb County Fire Department. Nor may the Respondents claim privity with the DeKalb County Fire Department. Under Georgia law, "[a] privy has generally been defined as one who is represented at trial and who is in law so connected with a party to the judgement as to have such an identity of interest that the party to the judgment represented the same legal right." *Butler v. Turner*, 274 Ga. 566, 569, 555 S.E.2d 427 (2001). At an administrative hearing convened solely to decide the propriety of a disciplinary action under the DeKalb County Fire Department's rules, none of the Respondents had any interest in an ultimate result that could remotely be

construed as "fully congruent" with the interests of the Fire Department. Respondents Jones and Wilder, moreover, cannot claim privity merely due to their status as employees of DeKalb County. "Although a master has privity with his servant and can claim the benefit of an adjudication in favor of the servant, a servant is not in privity with the master so as to claim the benefit of an adjudication in favor of the master." *Gilmer v. Porterfield*, 233 Ga. 671, 212 S.E.2d 842 (1975); *see also Anderson Oil Co. Inc. v. Benton Oil Co*, 246 Ga. 304, 271 S.E.2d 207 (1980)(president of company not in privity with company); *See Wickliffe v. Wickliffe Company*, 227 Ga. App. 432, 489 S.E.2d 153 (1997)(mutuality remains the law in Georgia.); *Shields v. Bellsouth Advertising*, 273 Ga. 774, 545 S.E.2d 898 (2001)(collateral estoppel requires identity of the parties or their privies).[9]

The Hearing Officer could only reverse the Department's decision because of an "error of fact or [if the decision] was motivated by intentional discrimination against the employee because of membership in a protected class." (App. C, 10a). Therefore, the nature of Travers' speech was not relevant, much less essential, to the Hearing Officer's decision. The Hearing Officer's "just cause" determination was based solely upon his conclusion that Travers' conduct was "insubordinate" and "unbecoming," judged by the Fire Department's definition of those terms. (App. E, 26a). These

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[9] *See e.g. Quinn v. Monroe County*, 330 F.3d 1320 (11th Cir. 2003). Quinn was terminated from her county position by the county administrator, James Roberts, in Monroe County, Florida. Quinn appealed to an administrative body that affirmed her termination. The fact findings of the administrative body did not have preclusive effect in Quinn's subsequent federal lawsuit alleging retaliation for exercising her First Amendment rights because Roberts, the remaining party-defendant before the Eleventh Circuit, "was not a party, or in privity with a party, to the Council proceeding." Florida's collateral estoppel law is identical to Georgia's. *See Essenson v. Polo Club Assocs.*, 688 So.2d 981, 983 (Fla.Dist.Ct.App. 1997).

fact findings do not begin to address any of the fact findings that determine the merits of a First Amendment claim. *See Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274, 97 S.Ct. 568 (1977). Since the nature of Travers' speech was not relevant to the Hearing Officer's determination, the "just cause" finding, under Georgia's collateral estoppel law, cannot be construed to foreclose a federal court inquiry into the substance of Travers' First Amendment claim. The inquiry called for by *Mt. Healthy, supra*, remains the paramount duty of the federal courts in light of the legislative history of § 1983 and will be conducted *de novo* as to all issues other than the "objective" cause to discipline an employee. *See Holley v. Seminole County School District*, 755 F.2d 1492, 1501 (11th Cir. 1985); *See also, Curry v. City of Syracuse*, 316 F.3d 324 (2nd Cir. 2003). The Court of Appeals wrongly concluded that, under Georgia law, a "just cause" determination at an administrative hearing ends any further inquiry into a First Amendment claim. *See Flournoy*, 198 Ga.App. At 88.

Under settled Georgia law, the Merit System hearing did not give Travers an adequate opportunity to litigate his federal constitutional claims. *Flournoy*, 198 Ga. App. at 88. The hearing officer, appointed by Respondent Vernon Jones, was not qualified—*nor allowed*—to consider the complex *Mt. Healthy* analysis. (App. G, 38a); *See e.g. Edmundson v. Borough of Kennett Square*, 4 F3d 186, 192 (11th Cir. 1993) ("[t]he commission simply does not have the background or experience to finally decide issues that give pause even to federal courts despite their familiarity with that area of the law"); *McDonald v. City of East Branch, Michigan et al*, 466 U.S. 284, 104 S.Ct. 1799 (1984)("[a]n arbitrator may not, therefore, have the expertise required to resolve the complex legal question that arise in § 1983 actions").[10]

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[10]In *Hall v. Marion School Dist. No. 2*, 31 F.3d 183, 191 (4th Cir. 1994), the Fourth Circuit refused to grant preclusive effect to the fact

Moreover, given the procedural inadequacies of the hearing, it did not comport with Georgia's requirement that Travers have a "full and fair opportunity" to litigate his claims. Unlike *Elliot*, Travers had no ability to compel the presence of witnesses and his sole defense, grounded as it was in the First Amendment, was not relevant at the hearing. (App. G, 38a). The County had every procedural advantage, including, by implication, the ability to order a witness to appear on its behalf and, by rule, the ability to call witnesses and tender documents in rebuttal that have never been disclosed to the employee. (App. F, 30a-32a). The Georgia Court of Appeals has ruled that such a hearing does not meet the requirements for application of collateral estoppel under Georgia law. *Flournoy*, 198 Ga. App at 88; see also, *Swain v. State*, 251 Ga. App. 110, 552 S.E.2d 880 (Ga. App. 2001)("[w]ithin the framework of this abbreviated procedure, [administrative license suspension hearings], the State has only a limited opportunity to litigate the issues, some of which may prove pivotal in a subsequent DUI trial").

Had the Court of Appeals correctly applied settled Georgia law, it would not have granted preclusive effect to the factual determinations of the hearing officer. Instead, the Court of Appeals fashioned its own standard for determining whether collateral estoppel will apply to administrative hearings in Georgia. As such, the court below's decision conflicts with the Court's decisions in *Elliot*, *supra* and *Fidelity Union Trust Co. et al v. Field*, 311 U.S. 169, at 176. The Court should grant certiorari and return Georgia's power to determine rules of collateral estoppel to the Georgia courts.

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findings of an administrative body that was plainly biased against the employee.

II. THE COURT'S DOCTRINE OF FEDERAL COLLATERAL ESTOPPEL IN § 1983 CASES DOES NOT BAR FULL ADJUDICATION OF CONSTITUTIONAL CLAIMS IN FEDERAL COURT

Codifying the principle of federalism that underlies our form of government, Congress long ago ordered the federal courts to afford full faith and credit to the judgments and records of state courts. 28 U.S.C. § 1738. After Congress passed 42 U.S.C. §1983 as part of the Ku Klux Klan Act of 1871, the court was forced to weigh Congress' competing interests in federalism, incorporated in 28 U.S.C. §1738, with its post Civil War distrust of state remedies for violations of federal constitutional rights. In *Allen v. McCurry*, 449 U.S. 90, 91, 101 S.Ct. 411 (1980), the Court determined that state court judgments could bar re-adjudication of *issues* in subsequent §1983 litigation. Several years later, the Court applied its reasoning in *Allen* and held that state court judgments barred re-adjudication of *claims* in subsequent §1983 litigation. *Migra v. Warren City School Dist. Bd. Of Educ., et al*, 465 U.S. 75, 85, 104 S.Ct. 892 (1984).

Our legal landscape has changed significantly since the enactment of §1983, thus the Court soon confronted whether the deference accorded to state judicial tribunals should be extended to state administrative hearings. A closely divided Court considered whether such deference should be accorded to state administrative hearings in *Tennessee v. Elliot*, *supra*. The Court found "no reason to suppose that Congress, in enacting the reconstruction civil rights statutes, wished to foreclose the adaptation of traditional principles of preclusion to such subsequent development as the burgeoning use of administrative adjudication in the 20th century." *Elliot*, 478 U.S. 788, at 797. On the other hand, the dissent voiced concern that the Court's effort to advance federalism would gradually erode the core principle of 42 U.S.C. § 1983—citizens bringing civil rights claims should have unfettered

access to federal courts to litigate their claims. *Elliot*, 478 U.S. at 802-03 (Stevens, J. dissenting). Balancing the competing interests of federalism and citizens' access to the federal courts for resolution of §1983 claims, the Court fashioned a narrow doctrine of preclusion that only afforded preclusive effect to "*disputed issues of fact properly before the state administrative body*," thereby leaving ultimate resolution of federal constitutional claims to the federal courts. *Id.* at 800.

The Eleventh Circuit has now disturbed that delicate balance by ignoring binding Georgia precedent and fashioning a doctrine of preclusion that allows an administrative "just cause" determination to bar litigation of a federal constitutional claim in federal court. Such an extension is unwarranted and conflicts with numerous decisions from this Court reiterating Congress' intent to guarantee unfettered access to *de novo* review of federal constitutional claims in federal court. *See Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274, 97 S.Ct. 568 (1977); *Patsy v. Florida Bd. of Regents*, 457 U.S. 496, 102 S.Ct. 2557 (1982); *McNeese v. Board of Education*, 373 U.S. 668, 83 S.Ct. 1433 (1963); *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473 (1961). The Court should grant certiorari to clarify this "unsettled area of law." *See Edmundson v. Borough of Kennett Square*, 4 F.3d. 186, 192 (3rd Cir. 1993).[11] *See Gold-berg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011 (1970); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 94 S.Ct. 1895 (1974).

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[11] The Circuits are split on this important question. The Third, Fourth and until this case, the Eleventh Circuit, refused to extend *Elliot*. *See e.g., Edmundson, supra*; *Dionne v. Mayor City Council of Baltimore*, 40 F.3d 677 (4th Cir. 1994); *Gjellum v. City of Birmingham*, 829 F.2d 1056 (11th Cir. 1987). The Ninth, Eighth and Tenth circuits have extended *Elliot*. *Miller v. County of Santa Cruz*, 89 F.3d. 1030 (9th Cir. 1994); *Gahr v. Trammel*, 796 F.2d 1063 (8th Cir. 1986); *Atiya, MD v. Salt Lake County, et al*, 988 F.2d 1013 (10th Cir. 1993).

A. A Narrow Interpretation of *Tennessee v. Elliot* Is Consistent with the Court's Precedent

A narrow interpretation of *Elliot* is consistent with the Court's prior pronouncements on state imposed limitations on access to a full adjudication of federal constitutional claims in federal court. In *Patsy v. Board of Regents of Florida*, 457 U.S. 496, 102 S.Ct. 2557 (1982), the Court reaffirmed that citizens were not required to exhaust state administrative remedies as a prerequisite to bringing an action pursuant to 42 U.S.C. § 1983. The Court relied on *three underlying themes* in the legislative history of the Civil Rights Act of 1871 to reach it decision. First, Congress intended that federal courts would assume a "paramount role" in protecting constitutional rights. *Patsy*, 457 U.S. at 503. Second, Congress suspected that the States were "unable or unwilling to protect the constitutional rights of individuals." *Id.* at 505-06. Third, "Congress intended to provide dual or concurrent forums in the state and federal system, enabling the plaintiff to choose the forum in which to seek relief." *Id. at 507.* In light of Congress' intent to provide unfettered access to the federal courts for §1983 claimants, the Court declined to impose an exhaustion requirement in §1983 cases.

That same year, the Court decided *McDonald v. City of West Palm Beach*, 466 U.S. 284, 104 S.Ct. 1799 (1984) and held that arbitration awards are not entitled to preclusive effect in subsequent § 1983 litigation. The Court reasoned that, "although arbitration is well suited to resolve contract disputes . . . it cannot provide an adequate substitute for a judicial proceeding in protecting the federal statutory and constitutional rights § 1983 is designed to safeguard." *Id.* at 290. The Court noted that an arbitrator may not "have the expertise required to resolve the complex legal questions that arises in § 1983 actions." *Id.* Moreover, arbitrators lack the authority to enforce § 1983's various remedies. *Id.* Finally, the Court reasoned that "the record of the arbitration

proceeding is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, testimony under oath, are often severely limited or unavailable." *Id.* (internal citations and punctuation omitted). Thus, in the absence of federalism concerns, the Court fully recognized the dangers inherent in allowing unqualified adjudicators decide important constitutional questions in a setting that lacks any of the safeguards of a judicial proceeding.

That is precisely why the Court struck such a careful balance in *Elliot*, 478 U.S. 788 at 799, where federalism was implicated, and illustrates why the Court must vigilantly monitor whether lower courts wrongly disturb that balance in a post-Elliot world. That is particularly true given the current predicament of the federal courts. Burgeoning federal dockets and the snails pace of judicial appointments must strongly tempt federal courts to extend judicially created doctrines to reduce the number of § 1983 claims filed in federal court.[12] But the Court has long since recognized that "*policy considerations alone cannot justify judicially imposed [rules] unless [the rule] is consistent with congressional intent.*" *Patsy*, at 513.

Where, as here, a federal court has succumbed to temptation and unnecessarily expanded upon a judge-made rule to facilitate disposition of civil rights cases, the Court must answer the call for "an exercise of [its] power of supervision." *Florida v. Rodriquez*, 469 U.S. 1, 7 (1984) (Stevens, J. dissenting). To ignore that call now and allow the Eleventh

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[12]*See e.g., Hope v. Pelzer*, 536 U.S. 730, 122 S.Ct. 2508 (2002). The Court granted certiorari and reversed the Eleventh Circuit's expansion of qualified immunity doctrine beyond the contours set by the Court's precedent. The Eleventh Circuit now views federal collateral estoppel as another way to accomplish the same objective—limit the number of §1983 cases in the federal courts.

Circuit's expansion of *Elliot* to stand would be tantamount to an abdication of the court's duty to abide by Congress' intent in enacting 42 U.S.C. § 1983. The decision below gives state administrators the paramount role in protecting constitutional rights; it assumes that states can now be trusted to enforce these rights; and it forces citizens to choose between an administrative remedy or federal court. *See Patsy, supra*. The court cannot countenance such an obvious display of contempt for Congress' objectives in enacting 42 U.S.C. § 1983.

B. The Eleventh Circuit's Broad Interpretation of Collateral Estoppel Would Destroy the Balance Struck in Elliot and Cause Citizens to Bypass Administrative Hearings.

The court below concluded that an administrative hearing officer's "for cause" finding cut off further inquiry into Travers' First Amendment retaliation claim. (App. A, 5a). In its view, if Travers cannot attack the administrative hearing officer's determination that his suspension for insubordination was justified, then he cannot state a First Amendment claim. *See Morris v. Crow, et al*, 117 F.3d 449, 458 (1997) (a public employer is not required to tolerate an embarrassing, vulgar, vituperative, ad hominem attack, simply because the employee was waiving a political sign). Thus, even though Travers could not raise his First Amendment defense at the administrative hearing (App. F, 33a; App G, 38a) and was not required to attend an administrative hearing before filing his federal lawsuit, *Patsy*, 457 U.S. 498, at 516, his decision to avail himself of an administrative proceeding extinguished his right to pursue his claim in federal court. (App. A, 7a).

A different panel of the Eleventh Circuit has recognized the fallacy of such a result. A "just cause" inquiry is "fundamentally different from one which is designed to protect First Amendment freedoms, primarily because the form is a question of state [or county] law." *Holley v.*

Seminole County School District, 755 F.2d 1492, 1501 (11th Cir. 1985). While "state-created procedures, if in keeping with due process, are generally adequate to safeguard such interests [just cause inquiries]," "[t]he same is not true for federal rights, both constitutional and statutory, whose traditional guardian has been the federal courts." *See McNeese v. Bd of Education*, 373 U.S. 668, 83 S.Ct. 1433 (1963)("such constitutional claims are entitled to be adjudicated in the federal courts"); see also *Professional Ass'n of College Educ. v. El Paso County Comm. College Dist.*, 730 F.2d 258, 264-67 (5th Cir.), *cert. denied* 469 U.S. 881, 105 S.Ct. 248 (1984)(hereinafter PACE). Therein, the Fifth Circuit recognized that the issue in [a First Amendment retaliation case] is not whether there is objective "cause" to fire an employee, but rather whether the employer was motivated by an unconstitutional desire to discharge an individual in retaliation for his First Amendment activity.

Petition recognizes that *Holley* and *PACE* were decided before *Elliot*, but their holdings are entirely consistent with the narrow doctrine of preclusion announced by the Court in *Elliot*. The Court never intended that unreviewed state administrative hearings would conclusively decide the issues relevant under *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 97 S.Ct. 568 (1977). *See Quinn v. Monroe County*, 330 F.3d 1320, 1333 (11th Cir. 2003). That inquiry remains the paramount duty of the federal courts in light of the legislative history of § 1983 and should be conducted *de novo* as to all issues other than the "objective" cause to discipline an employee. *See e.g., Gjellum v. City of Birmingham*, 829 F.2d 1056 (11th Cir. 1987); *Curry v. City of Syracuse*, 316 F.3d 324 (2nd Cir. 2003); *Edmundson v. Borough of Kennett Square*, 4 F.3d 186 (3rd Cir. 2003); *but see, Gahr v. Trammel*, 796 F.2d 1063 (8th Cir. 1986).

The Third Circuit set forth sound procedural reasons justifying a narrow interpretation of *Elliot*. The court acknowledged that an administrative body might well

determine facts, such as "whether the plaintiff actually made the statements in the circumstances alleged," but lacked the ability to properly decide the more complex constitutional question of "whether the statements are constitutionally protected." *Edmundson*, 4 F.3d 186, at 193. Where, as here, the Court of Appeals has wrongly determined that the constitutional inquiry is foreclosed by virtue of administrative fact findings the complex *Mt. Healthy* analysis is subsumed into a pedantic "just cause" inquiry. As the Eleventh Circuit previously recognized in *Gjellum*, "the purpose and importance of Section 1983, the limitations on state administrative agencies as forums for the protection of federal rights, and policy considerations favoring allowing initial resort to state administrative agencies without risking preclusion from relitigating matters beyond that actually adjudicated before the agency, counsel against any judicially-created claim preclusion rules." *Gjellum v. City of Birmingham, et al.*, 829 F.2d 1056, 1064 (11th Cir. 1987).

Furthermore, extending *Elliot* in the manner contemplated by the court below would ironically result in more §1983 litigation in federal courts. As the Fourth Circuit recognized in *Dionne v. Mayor City Council of Baltimore*, 40 F3d. 667, 684 (4th Cir. 1994), "neither private party costs nor the burden of the federal courts would be eased by a rule of claim preclusion."

> Because plaintiffs might well choose to bypass the administrative agency and go directly to federal or state court with a §1983 claim rather than forfeit the right to pursue that claim, the cost of litigation and the burden on the federal court system could well rise, instead of fall, if claim preclusion applied. Plaintiffs would be discouraged from pursuing the generally cheaper and more efficient route of seeking an administrative remedy in order to preserve their federal rights. *See Frazier v. King*, 873 F.2d 820, 824 (5th Cir. 1989) (a rule of claim preclusion "would encourage plaintiffs to bypass admin-

> istrative proceedings in order to preserve their claims under §1983"); *see also 18 Wright, Miller & Cooper, supra*, §4412, at 93; accord, *Gjellum, supra* at 1069.

While unsophisticated public employees may still attend administrative hearings as a first step to resolving legitimate disputes over their constitutional right to free speech in the workplace. Public employees who seek competent counsel will forego administrative review and head straight to the federal courthouse.

Thus, extending *Elliot* as envisioned by the Court below serves none of the underlying principles of the Court's jurisprudence and manifestly ignores congressional intent. Federalism is not served, as employees will ignore state remedies and flock to the federal courthouse. On the other hand, access to the federal courts as a *concurrent* venue to state court will not be served in those instances where an unsuspecting employee finds that his legitimate First Amendment claim died at the hands of an unqualified administrative hearing officer. Therefore, Petition invites the Court to grant certiorari to clarify the scope of its holding in *Elliot*, and reinforce the continued vitality of §1983 claims for public employees who seek concurrent remedies before state administrative tribunals.

CONCLUSION

For the within and foregoing reasons, Petitioner respectfully requests that the Court grant certiorari, review and reverse the decision of the Eleventh Circuit Court of Appeals.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 02-14043
Non-Argument Calendar

JAMES J. TRAVERS,
Plaintiff-Appellee,

v.

VERNON JONES, Individually and in his official capacity as Chief Executive Officer of DeKalb County, Georgia, SCOTT B. WILDER, Individually and in his official capacity as Fire Chief of DeKalb County, Georgia,
Defendants-Appellants.

March 11, 2003

Firefighter who had been suspended without pay due to insubordination and conduct unbecoming on/off duty brought action against county chief executive officer (CEO) and fire chief alleging First Amendment violations. The United States District Court for the Northern District of Georgia, No. 01-01734-CV-RLV-1, Robert L. Vining, Jr., J., entered judgment denying defendants' claim of qualified immunity. On appeal, the Court of Appeals held that firefighter received a full and fair opportunity to present his case at the administrative hearing.

Reversed.

Appeal from the United States District Court
for the Northern District of Georgia.

Before *TJOFLAT*, *BIRCH* and *RONEY*, Circuit Judges.

PER CURIAM:

This is an appeal from a denial of qualified immunity to the two defendant-appellants, Vernon Jones, Chief Executive Officer of DeKalb County ("CEO Jones"), and Scott Wilder, Fire Chief of DeKalb County ("Chief Wilder"). Neither party has requested oral argument. Wilder had disciplined firefighter James J. Travers by suspending Travers for thirty days without pay due to insubordination and conduct unbecoming on/off duty involving CEO Jones. Travers' complaint alleged that he was disciplined in retaliation for his having engaged in protected union activity, and that CEO Jones and Chief Wilder had thus violated his First Amendment rights of free speech, freedom of association, and freedom of petition. The district court denied qualified immunity on the ground that there were issues of fact concerning the reasons that Travers was disciplined. We hold that, pursuant to the settled law concerning "fact preclusion," the facts had been found favorably to the defendants by an administrative hearing officer, and under those facts by which plaintiff was bound, their conduct did not violate Travers' constitutional rights. We therefore REVERSE the judgment of the district court denying the defendants' qualified immunity.

Briefly, firefighter Travers was involved in a verbal exchange with CEO Jones while Travers and a group of other firefighters were picketing outside the County's administration building during his off-duty hours. Chief Wilder suspended Travers for thirty days without pay for his insubordinate and unbecoming conduct during the verbal exchange with CEO Jones. No individual, other than Travers, was disciplined by Chief Wilder for simply picketing in front of the County administration building.

As presented to the district court, there was a sharp conflict between the plaintiff and the defendants as to what transpired

at that time. The district court properly determined that the merits of the case turn on whether the plaintiff's or the defendants' version of the facts is correct.

Once the defendants established that they were acting within their discretionary authority, a point not in dispute here, the burden shifted to the plaintiff to show that qualified immunity is inappropriate. *See Lee v. Ferraro*, 284 F.3d 1188, 1194 (11th Cir.2002). The plaintiff had to allege facts that show that the officer's conduct violated a clearly established constitutional right. *See Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001); *Chesser v. Sparks*, 248 F.3d 1117, 1122 (11th Cir.2001).

The law is clearly established that an employer may not demote or discharge a public employee for engaging in protected speech. *See Rankin v. McPherson*, 483 U.S. 378, 383, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987); *Chesser*, 248 F.3d at 1122. An employer may, however, discipline an employee for insubordination. "The First Amendment does not require a public employer to tolerate an embarrassing, vulgar, vituperative, ad hominem attack, simply because the employee . . . was waving the [political] sign while conducting the attack." *Morris v. Crow*, 117 F.3d 449, 458 (11th Cir.1997); *see Chesser*, 248 F.3d at 1125 (stating that "[w]e can find no concrete and factually defined case that has held unconstitutional an employer's decision to discharge an employee due in part to insubordination").

Under the plaintiff's version of the facts, he was indeed engaging in protected speech and the first principle above would apply. Generally, when there are issues of fact such as these, qualified immunity must be denied because the court, at this stage of the proceedings, must view the facts most favorable to the plaintiff. *See Chesser*, 248 F.3d at 1121. Under the defendants' version, Travers was insubordinate and engaged in unbecoming conduct, so that the second principle would apply.

This issue of fact between the parties, however, has been resolved in the state administrative proceeding. Travers, represented by counsel, appealed to a merit system hearing officer pursuant to the Code of DeKalb County. The hearing officer made the following findings regarding the exchange between CEO Jones and Travers in a written report: Travers was participating in a picket demonstration in front of the administration building. As CEO Jones exited the building, Travers turned to him and repeatedly chanted Jones's first name in a "loudly, menacingly and taunting manner." CEO Jones approached Travers and asked whether he was a County employee. Travers acknowledged that he was a County employee exercising his rights as a citizen. CEO Jones told Travers that while he did not mind that Travers was exercising his rights, he would not tolerate Travers' insubordinate actions. Travers then said that he needed to take off his sunglasses so that he could look into CEO Jones's eyes. CEO Jones repeated that he would not tolerate Travers' insubordinate actions and walked away. The verbal exchange between Jones and Travers was observed and corroborated by the Assistant County Administrator, as well as the Director of Public Works. The hearing officer found that his findings did *not* indicate any non-job-related factor or any errors of fact that would reverse Chief Wilder's 30 days' suspension of Travers for insubordination and conduct unbecoming on/off duty.

Those findings are binding upon the court in a case such as this one if the employee received a full and fair opportunity to present his case in the administrative hearing. When a state agency, acting in a judicial capacity, resolves disputed issues of fact properly before it that the parties have had an adequate opportunity to litigate, federal courts must give the agency's fact finding the same preclusive effect to which it would be entitled in the State's court. *See University of Tenn. v. Elliott*, 478 U.S. 788, 799, 106 S.Ct. 3220, 92 L.Ed.2d 635 (1986). Under Georgia law, once an administrative body rules on

questions of fact, the questions of fact are thereafter precluded from re-litigation. *See Jordan v. Board of Pub. Safety*, 253 Ga.App. 339, 559 S.E.2d 94, 97 (Ga.Ct. App.2002); *Blackwell v. Georgia Real Estate Comm'n*, 205 Ga.App. 233, 421 S.E.2d 716, 717 (Ga.Ct.App.1992). Contrary to the decision of the district court, it appears that Travers did receive a full and fair opportunity to litigate at an administrative hearing.

Travers argues that he was denied full and fair opportunity to litigate his case at the County Merit System hearing. First, he asserts that two impartial eyewitnesses would have provided testimony that directly refuted testimony that Travers was taunting, disrespectful, or insubordinate. That is, Travers argues that his inability to compel these witnesses to testify resulted in a misleading and incomplete record. Second, Travers argues that he was denied meaningful opportunity to cross-examine his opposing witness because he was not permitted to compel the attendance of Jones to the hearing.

The DeKalb County Employee Disciplinary Action Appeal Administrative Procedures set forth procedural requirements for identifying and notifying witnesses of a party's desire for their presence. Specifically, the procedures state that the Merit System Director cannot compel the attendance of any county employee unless the requesting party, Travers in this case, does so at least five working days before the hearing.

Travers requested that the Merit System Director notify several witnesses of their desired presence at the hearing *less than* five working days before the hearing was scheduled. This is not disputed. Because Travers' request was less than five working days before the hearing, any inability to present live witnesses is due to Travers' own inaction. "The fact that [the plaintiff] failed to avail himself of the full procedures provided by the state law does not constitute a sign of their inadequacy." *Kremer v. Chemical Constr. Co.*, 456 U.S. 461,

485, 102 S.Ct. 1883, 72 L.Ed.2d 262 (1982) (concluding that administrative proceedings were proper in an employment discrimination context).

Contrary to Travers' assertion, a party has no right to subpoena witnesses to state administrative hearings. *See, e.g., Amundsen v. Chicago Park Dist.*, 218 F.3d 712, 717 (7th Cir.2000); *Calvin v. Chater*, 73 F.3d 87, 92 (6th Cir.1996); *DeLong v. Hampton*, 422 F.2d 21, 24-25 (3d Cir.1970) (refusing to recognize a right to subpoena witnesses to an administrative hearing). The County afforded Travers the opportunity to a hearing where he could present live witnesses and cross-examine opposing witnesses. Travers' inability to do so was a result of his own tardiness.

The two "impartial" witnesses Travers untimely requested to testify at his administrative hearing would not have likely changed the outcome of the County administrative appeal or this appeal. In this appeal, for example, the alleged First Amendment violation turns on Chief Wilder's subjective intent as to (1) whether he believed Travers' "disrespectful" behavior was insubordinate, meriting the suspension of Travers, or (2) whether Chief Wilder's suspension of Travers was in retaliation for Travers exercising of his First Amendment rights. *See Walker v. Schwalbe*, 112 F.3d 1127, 1133 (11th Cir.1997) (noting that "the government's state of mind is a critical element in First Amendment" retaliatory claims). Travers has not suggested that the two excluded witnesses would have been able to offer any testimony that would shed light on Chief Wilder's perception of the events and on his subjective intent. Instead, Travers only intended to put forth these witnesses to refute the testimony of the County's witnesses that he was taunting and being insubordinate.

Since Travers had full and fair opportunity to litigate the factual issues at the administrative hearing, this Court must give the Merit System hearing officer's fact finding

preclusive effect. Travers cannot re-litigate the facts in this case.

Under these facts, no constitutional violation took place. CEO Jones and Chief Wilder are entitled to qualified immunity.

REVERSED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed May 29, 2003]

No. 02-14043-II

JAMES J. TRAVERS,

Plaintiff-Appellee,

v.

VERNON JONES, Individually and in his official capacity as Chief Executive Officer of DeKalb County, Georgia, SCOTT B. WILDER, Individually and in his official capacity as Fire Chief of DeKalb County, Georgia,

Defendant-Appellants.

On Appeal from the United States District Court
for the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinion _____, 11th Cir., 19__, _____ F.2d _____).

Before: TJOFLAT, BIRCH and RONEY, *Circuit Judges.*

PER CURIAM:

The Petitions(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petitioner(s) for Rehearing En Banc are

DENIED.

ENTERED FOR THE COURT:

(Original Signed by Paul H. Roney)
UNITES STATES CIRCUIT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action File No. 1:01-CV-1734-RLV

JAMES T. TRAVERS,

Plaintiff,

vs.

DEKALB COUNTY, GEORGIA; VERNON JONES, Individually and in his Official Capacity as Chief Executive Officer of DeKalb County, Georgia; SCOTT B. WILDER, Individually and in his Official Capacity as Fire Chief of DeKalb County, Georgia;

Defendants.

ORDER

In an order entered on June 18, 2002, this court denied the defendants' motion for summary judgment as to the claims against DeKalb County and as to the claims against Vernon Jones and Scott Wilder in their individual capacities. Pending before the court are the defendants' motion for reconsideration *of* the court's order [Doc. No. 34] and the defendants' motion to stay the proceedings and request for certificate *of* immediate review [Doc. No. 41].

The defendants allege that their filing *of* a motion for reconsideration was necessary to correct a clear error *of* law. Specifically, they refer to the Eleventh Circuit's pronouncement that "*Scala v. City of Winter Park*, 116 F.3d 1396 (11th Cir. 1997), serves as our compass in the area *of* determining whether officials act with final policymaking authority so as to trigger entity liability under *Monell*."

Denno v. School Board of Volusia County, 218 F.3d 1267, 1276 (11th Cir. 2000). The defendants argue that because the court did not consider *Scala* in its analysis, the court must reconsider their motion for summary judgment. Although the court did not specifically refer to *Scala* by name, the analysis of entity liability contemplated by *Scala* was inherent in the court's order. The court will, nevertheless, specifically address, pursuant to *Scala*, whether Mr. Jones and Chief Wilder have final policymaking authority.

The Eleventh Circuit has stated that its "*post-Praprotnik* decisions have consistently recognized and given effect to the principle that a municipal official does not have final policymaking authority over a particular subject matter when that official's decisions are subject to meaningful administrative review." *Scala*, 116 F.3d at 1401. In its discussion of whether to provide issue preclusion status to the findings of the hearing officer of the DeKalb County Merit System, this court stated that there were conflicting accounts as to what actually transpired on the morning of May 14, 2001. This is because of what might be described as the procedural inadequacies of such a hearing. Specifically, the plaintiff was unable to compel the attendance of Mr. Jones and two witnesses who would have supported, at least in part, the plaintiff's account. The court later noted that Section 20-194 of the Code of DeKalb County provides that "the hearing officer may reverse the decision of the department head only on a finding that it was based on error of fact or was motivated by intentional discrimination against the employee because of membership in a protected class." Because the plaintiff was unable to present all of his witnesses and because the hearing officer could only reverse the decision of the department head in certain instances, the court hereby holds that the DeKalb County Merit System fails to provide the plaintiff with the "meaningful administrative review" of his disciplinary action contemplated by *Scala*. Accordingly,

there is at least a question of fact as to whether Mr. Jones[1] and Chief Wilder acted as final policymakers sufficient to trigger entity liability pursuant to *Monell*. Thus, the defendants' motion for reconsideration is DENIED.

The defendants have also filed a motion to stay these proceedings and a request for certification of immediate review. The defendants have already appealed this court's denial of qualified immunity to the Eleventh Circuit, and they assert that reasons of judicial economy favor granting the requested relief. The court is not persuaded. Accordingly, the defendants' motion to stay these proceedings and request for certificate of immediate relief is DENIED.

For all of the foregoing reasons, the defendants' motion for reconsideration of the court's order [Doc. No. 34] is DENIED. The defendants' motion to stay the proceedings and request for certificate of immediate review [Doc. No. 41] is DENIED.

SO ORDERED, this 21st day of August, 2002.

ROBERT L. VINING, JR.
Senior United States District Judge

[1] The defendants have repeatedly alleged that there are no facts which would indicate that Mr. Jones was involved in the discipline of the plaintiff in any manner. The plaintiff, however, has presented two witnesses who have stated that Mr. Jones pointed his finger at the plaintiff's face and told him that he was being insubordinate and should not be picketing. Moreover, the plaintiff stated that Mr. Jones had previously expressed his frustration with the daily picket. A jury could infer, therefore, that Mr. Jones had some role in the plaintiff's discipline.

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action File No. 1:01-CV-1734-RLV

JAMES T. TRAVERS,

Plaintiff,

vs.

DEKALB COUNTY, GEORGIA; VERNON JONES, Individually and in his Official Capacity as Chief Executive Officer of DeKalb County, Georgia; SCOTT B. WILDER, Individually and in his Official Capacity as Fire Chief of DeKalb County, Georgia;

Defendants.

ORDER

This is a civil rights action pursuant to 42 U.S.C. § 1983, in which the plaintiff alleges that his constitutional rights were violated when he was suspended for 30 days without pay from his job as a firefighter; the complaint also alleges a state cause *of* action pursuant to the Georgia Constitution. Pending before the court are the defendants' motion for summary judgment [Doc. No. 14], the defendants' motion for leave to file a brief in excess *of* the page limitation [Doc. No. 16], the plaintiff's motion for leave to file a brief in excess *of* the page limitation [Doc. No. 19], and the plaintiff's motion for leave to file a notice *of* supplemental authority in opposition to the defendants' motion for summary judgment [Doc. No. 31].

I. FACTUAL AND PROCEDURAL BACKGROUND

The plaintiff, James J. Travers, is a firefighter employed by the DeKalb County Fire Department. He began his employment with that fire department on May 18, 1998. One of the defendants, Vernon Jones, is the Chief Executive Officer of DeKalb County. The other individual defendant, Scott Wilder, is the DeKalb County Fire Chief.

In early 2001, DeKalb County implemented a new pay classification, which the plaintiff alleges resulted in a gross pay disparity between the various ranks within the fire department. In March 2001, members of the local firefighters' union began to protest the inequities of the new system. The plaintiff alleges that the firefighters were unhappy with a plan in which long-term employees of higher ranks and with more years of service were paid less than junior employees holding lower ranks. As a result, the firefighters began an informational picket. The plaintiff states that the firefighters were taught that they needed to chant in order to call attention to the picket. The plaintiff alleges that the firefighters chanted, "Vernon, Vernon. What do we want? Equal Pay for Equal Work! When do we want it? Now!" The plaintiff states that this was done in a respectful, non-taunting manner.

On May 14, 2001, the plaintiff, who was off-duty, was picketing outside of the Manuel Maloof Administration Building in DeKalb County. He states that his sign read, "Equal Pay For Equal Work"/ "Honk For Firefighters." At the time, there were others picketing in connection with their concerns about a county ordinance. The plaintiff observed Mr. Jones at a distance walking between two county administration buildings. The plaintiff states that he attempted to draw attention to the picket by twice calling his name: "Vernon, Vernon." The plaintiff alleges that he was neither disrespectful nor insolent but was merely protesting. The defendants maintain that the chant was done in a loud, taunting manner. Mr. Jones approached the plaintiff and

informed him that he was being an "insubordinate" employee. The plaintiff states that Mr. Jones angrily confronted him, shouting and pointing his finger in the plaintiff's face. The plaintiff alleges, moreover, that Mr. Jones stated that he did not want the plaintiff to be picketing. During the encounter, the plaintiff had removed his sunglasses. The defendants state that the manner in which the plaintiff removed his sunglasses was perceived in a "negative light" by Mr. Jones and by Morris Williams, the Assistant County Administrator, who was standing nearby.

The incident on the morning of May 14, 2001, was witnessed by Officer Gail Karabeika of the DeKalb County Police Department. Following the encounter, Officer Karabeika was dispatched to obtain the plaintiff's name. The plaintiff alleges that this action was taken solely for purposes of intimidation and harassment. The defendants state that Mr. Jones never directly or indirectly requested that any disciplinary action be taken against the plaintiff because of the events of May 14. On May 16, the plaintiff met with Chief Wilder to discuss the incident. The defendants note that the plaintiff also demonstrated the manner in which he removed his sunglasses. On May 17, Chief Wilder suspended the plaintiff for 30 days due to allegations of "insubordination" and "conduct unbecoming on/of£ duty." The plaintiff states that this was based on a complaint/report from Mr. Jones' office and from others who witnessed the incident. The letter notifying the plaintiff of his suspension advised him of his right to appear before the fire chief to respond and also of his right to appeal to the merit system. The defendants allege that in response to a request by Chief Wilder, the plaintiff on June 21 wrote a statement in an effort to explain his intent in calling out Mr. Jones' name. On July 17, Chief Wilder advised the plaintiff by letter that the proposed discipline would be imposed as previously stated.

The plaintiff appealed his suspension to a merit system hearing officer. On October 29, 2001, the hearing officer heard the plaintiff's appeal and subsequently issued a decision denying it and upholding the suspension. The hearing officer found that the plaintiff had "repeatedly chanted the CEO's first name in a loudly, menacingly and taunting manner." The defendants state that the hearing officer has the power to reverse a disciplinary action if he or she finds that the discipline was motivated by a non-job related factor or that the decision to discipline was based on an error in fact. The defendants note that the hearing officer's written decision indicated that he did not find any non-job related factor or errors of fact that would reverse the department's decision to suspend the plaintiff. The defendants contend that the plaintiff has no facts which would indicate that the hearing officer was improperly biased against him or that the officer took into account any factors other than those which were set forth in his decision.

The defendants emphasize that the record does not indicate that anyone other than Chief Wilder, including Mr. Jones, had a role in the decision to discipline the plaintiff. The defendants also allege that Chief Wilder has never disciplined any firefighter for picketing. The defendants state, moreover, that the decision was made without outside pressure from any other party. The defendants contend that while firefighters had picketed prior to May 4, 2001, the county had never disciplined nor proposed discipline against any individual for conduct that occurred during protests or pickets. The county has, however, proposed discipline with respect to at least one other employee who was insubordinate to Mr. Jones. The defendants also state that Dekalb County does not have an ordinance, regulation, custom, practice, or policy which is hostile to the exercise of free speech rights.

The plaintiff filed the instant action, alleging that the discipline he received was in retaliation for his having engaged

in union activity and therefore violated his rights under the First Amendment. The plaintiff has also alleged that his free speech rights pursuant to the Georgia Constitution were violated.

II. LEGAL DISCUSSION

Rule 56(c) of the Federal Rules of Civil Procedure authorizes summary judgment when all "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The party seeking summary judgment bears the burden of demonstrating that no dispute as to any material fact exists. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2552-53 (1986) *Rice-Lamar v. City of Fort Lauderdale*, 232 F.3d 836, 840 (11th Cir. 2000). The moving party's burden is discharged merely by "showing—that is, pointing out to the district court—that there is an absence of evidence to support [an essential element of] the nonmoving party's case." *Catrett*, 477 U.S. at 325, 106 S.Ct. at 2554. In determining whether the moving party has met this burden, this court must view the evidence and all factual inferences in the light most favorable to the party opposing the motion. *Johnson v. Clifton*, 74 F.3d 1087, 1090 (11th Cir. 1996). Once the moving party has adequately supported its motion, the non-movant then has the burden of showing that summary judgment is improper by coming forward with specific facts showing a genuine dispute. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 1356 (1986).[1]

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[1] The Eleventh Circuit has held that the nonmoving party need not necessarily "'produce evidence in a form that would be admissible at trial . . . to avoid summary judgment;'" instead, its evidence must be "'reduc[ible] to admissible evidence.'" *United States v. Four Parcels of Real Property*, 941 F.2d 1428, 1444 (11th Cir. 1991), quoting *Celotex*, 477 U.S. at 324-27, 106 S.Ct. 2553-55.

In deciding a motion for summary judgment, it is not the court's function to decide genuine issues of material fact but to decide only whether there is such an issue to be tried. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251, 106 S.Ct. 2505, 2511 (1986). The applicable substantive law will identify those facts that are material. *Id.* at 248, 106 S.Ct. at 2510. Facts that in good faith are disputed, but which do not resolve or affect the outcome of the case, will not preclude the entry of summary judgment as those facts are not material. *Id.* Genuine disputes are those by which the evidence is such that a reasonable jury could return a verdict for the non-movant. *Id.* In order for factual issues to be "genuine," they must have a real basis in the record. *Matsushita*, 475 U.S. at 586, 106 S.Ct. at 1356. When the record as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial. *Id.* (citations omitted).

Before considering the summary judgment motion, the court notes that the plaintiff and the defendants have each filed a motion for leave to file briefs in excess of the page limitation. The court will GRANT both motions. The plaintiff's motion to file a notice of supplemental authority in opposition to the defendants' motion for summary judgment is DENIED.

The defendants have proffered several reasons as to why they are entitled to summary judgment. First, they contend that the plaintiff is precluded from arguing the facts surrounding his actions because he was given an opportunity to litigate the substantive issues of the charges against him at the administrative hearing. The defendants also maintain that the plaintiff is unable to establish that he engaged in protected speech or conduct and that his speech or conduct was the motivating factor behind the defendants' actions. The defendants next assert that they are not liable in their official capacities because the plaintiff cannot show that any alleged

constitutional deprivation resulted from a policy, custom, or practice. The defendants also allege that Mr. Jones and Chief Wilder are entitled to qualified immunity as to the allegations against them in their individual capacities. Finally, the defendants contend that they are not liable for any state law claims because the Georgia Constitution does not afford the plaintiff any greater free speech rights than those under the United States Constitution.

As an initial matter, the court notes that in addition to naming DeKalb County as a defendant, the plaintiff has sued both Mr. Jones and Chief Wilder in their official capacities. The individual defendants seek summary judgment as to those claims. A section 1983 suit against a government official in his official capacity is the equivalent to a suit against the entity which he represents. *Kentucky v. Graham*, 473 U.S. 159, 165-66, 105 S.Ct. 3099, 3104 (1985). Accordingly, the court hereby GRANTS summary judgment with respect to the claims against Mr. Jones and Chief Wilder in their official capacities.[2]

The defendants contend that the findings of the hearing officer should be taken as undisputed for the purposes of this action and that the plaintiff, therefore, is precluded from arguing that he did not turn to Mr. Jones and in a "loudly, menacingly, and taunting manner" begin to repeatedly chant his first name. The plaintiff asserts that issue preclusion does not apply here in part because he did not have a full and fair opportunity to litigate the facts. Specifically, the plaintiff was unable to compel the attendance of witnesses at the DeKalb County Merit System Hearing. Accordingly, the plaintiff alleges that he was denied the opportunity to present the testimony of two witnesses who supported, at least in part, his

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[2] This ruling is not an adjudication on the merits of those claims but is simply a dismissal of those claims as being duplicative of the claims asserted against the county.

version of events. The plaintiff states that the testimony of Officer Karabeika and that of Tee Okonkwo, an attorney who witnessed part of the encounter, would have refuted Mr. Jones' allegation that the plaintiff was taunting him or was otherwise being insubordinate. The plaintiff states, moreover, that because he could not compel the attendance of Mr. Jones to the hearing, he was denied a meaningful opportunity to cross-examine his accuser. Because of these factors, the court hereby declines to provide issue preclusion status to the findings of the hearing officer of the DeKalb County Merit System. There are conflicting accounts as to what exactly occurred on the morning of May 14, 2001. Accordingly, there is a disputed issue of material fact as to whether the plaintiff was taunting Mr. Jones and perhaps being insubordinate or merely calling out his name in an attempt to draw his attention to the protest of the alleged pay disparity.

The defendants maintain that the plaintiff cannot establish that he engaged in protected speech or conduct and that the speech or conduct was the motivating factor behind the defendants' actions. Thus, they contend that the plaintiff cannot show that he was retaliated against for exercising his First Amendment rights. A public employee's First Amendment retaliation claim is examined under a four-part test: (1) whether the employee's speech involves a matter of public concern; (2) whether the employee's interest in speaking outweighs the government's legitimate interest in efficient public service; (3) whether the speech played a substantial part in the government's challenged employment decision; and (4) whether the government would have made the same employment decision in the absence of the protected speech. *Bryson v. City of Waycross*, 888 F.2d 1562, 1565-66 (11th Cir. 1989). The defendants assert that the plaintiff's chanting of Mr. Jones' first name was not a matter of public concern and, therefore, not entitled to constitutional protection. They further argue that even if the court does determine that it was a matter of public concern, the plaintiff cannot show that his

interest in speaking outweighed the defendants' legitimate interest in efficient public service because the plaintiff's speech had a detrimental impact on efficiency within his department.

The content, context, and form of the employee's speech must be examined to determine whether it addresses a matter of public concern. *Bryson*, 888 F.2d at 1565. It is obvious that, standing alone, the words "Vernon, Vernon" are not a matter of public concern. That is how the defendants narrowly attempt to portray the speech at issue. Because of the nature of the protest and the conflicting accounts of what transpired that morning, a jury could find that the plaintiff was merely trying to draw Mr. Jones' attention to the protest of the alleged pay disparity—an issue that is more clearly a matter of public concern.

The second factor favors the plaintiff. As a firefighter, the plaintiff has a significant interest in the alleged inequities of the pay classification system. The defendants correctly note that DeKalb County has a legitimate interest in efficient public service. Their argument, however, assumes that the plaintiff was acting in an insolent and insubordinate fashion. Whether the plaintiff's actions diminished the efficiency of the government employer is a question of fact.

With respect to the third factor, the employee's initial burden in showing that retaliation was a substantial factor behind the government's employment decision is not a difficult one to meet. *Walker v. Schwalbe*, 112 F.3d 1127, 1131 (11th Cir. 1997). The defendants state that there is a lack of evidence of any intent to retaliate, noting that prior to May 14, other firefighters had protested and picketed without being disciplined. The court has already noted that there are factual disputes as to what transpired on the morning in question. If a jury were to believe the plaintiff's account, it could easily conclude that retaliation was a substantial factor in the decision to suspend him. The same analysis applies to

the fourth factor. But for whatever happened on May 14, the plaintiff would not have been suspended. Accordingly, a jury could conclude that the plaintiff was retaliated against for exercising his First Amendment rights.

The defendants next contend that DeKalb County is entitled to summary judgment because the plaintiff cannot show that there is a regulation, custom, policy, or practice that caused the alleged harm. A local government may be sued under section 1983 only when the constitutional injury results from the government's policy or custom. This includes official government policy, the actions of an official deemed to represent government policy, or a custom or practice so well-settled that it assumes the force of law. *Monell v. Department of Social Services*, 436 U.S. 658, 694, 98 S.Ct. 2018, 2037-38 (1978). A single act sanctioned by the municipality is sufficient to establish policy pursuant to section 1983 when the municipal officials have "final policy-making authority." *Bannum, Inc. v. City of Fort Lauderdale*, 901 F.2d 989, 997 (11th Cir. 1990), citing *City of St. Louis v. Praprotnik*, 485 U.S. 112, 123, 125, 108 S.Ct. 915, 924 (1988) (plurality opinion).

Section 20-190 of the Code of DeKalb County provides that both the chief executive and the head of the department to which an employee is assigned are authorized to take disciplinary action.

Section 20-194 provides that an employee who believes he was discriminated against may appeal to a hearing officer. Pursuant to that section, "the hearing officer may reverse the decision of the department head only on a finding that it was based on error of fact or was motivated by intentional discrimination against the employee because of membership in a protected class."

The alleged constitutional injury here is the result of official government policy. Chief Wilder suspended the

plaintiff and the suspension was upheld by the hearing officer. These actions were in accordance with the policies of Dekalb County. These individuals, therefore, have final policy-making authority. This is sufficient to hold the entity liable pursuant to section 1983. Accordingly, DeKalb County is not entitled to summary judgment on this basis. The defendants' motion for summary judgment as to the claims against DeKalb County is DENIED.

The defendants next contend that Mr. Jones and Chief Wilder are entitled to summary judgment as to the allegations against them in their individual capacity on the basis of qualified immunity. The doctrine of qualified immunity protects government actors performing discretionary functions from being sued in their individual capacities. *Lassiter v. Alabama A&M University Board of Trustees*, 28 F.3d 1146, 1149 (11th Cir. 1994) (en banc). Qualified immunity shields government officials from liability to the extent that "their conduct does not violate clearly established . . . constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 817-18, 102 S.Ct. 2727, 2738 (1982). In determining whether qualified immunity is applicable, a two-step analysis is necessary: (1) a court must determine whether the defendant's conduct violated a clearly established constitutional right; and (2) if so, the court determines whether a reasonable government official would have been aware that his conduct amounted to a constitutional violation. *Tindal v. Montgomery County Commission*, 32 F.3d 1535, 1539 (11th Cir. 1994). This approach is designed to protect "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 1096 (1986).

In order for the law to be clearly established such that qualified immunity does not apply, it must have been recognized by controlling precedent in a "concrete and factually defined context." *Lassiter*, 28 F.3d at 1149; *see also*

Post v. City of Fort Lauderdale, 7 F.3d 1552, 1557 (11th Cir. 1993) ("If case law in factual terms, has not staked out a bright line, qualified immunity almost always protects the defendant."). A plaintiff cannot withstand the qualified immunity defense "by referring to general rules and to the violation of abstract rights." *Lassiter*, 28 F.3d at 1150 (internal quotation omitted). If the constitutional right is clearly established, the plaintiff must demonstrate that a reasonable government actor would have realized that what he was doing violated that right. *Williams v. Alabama State University*, 102 F.3d 1179, 1182 (11th Cir. 1997).

The defendants contend that even if there was a constitutional violation, the plaintiff cannot point to a controlling case which would have alerted Chief Wilder and Mr. Jones that they were violating the plaintiff's constitutional rights. A court's qualified immunity inquiry is typically very fact specific. The test generally involves objective legal reasonableness rather than a subjective component. There are certain instances, however, when a public official's state of mind is an underlying component of the alleged constitutional violation. It is then that the official's state of mind must be considered in the qualified immunity analysis. Otherwise, it would be nearly impossible for a plaintiff to withstand a qualified immunity defense. Accordingly, the intent of the government actor is relevant when subjective motive is a critical element of the constitutional violation. The actor's state of mind is relevant to a First Amendment retaliation claim. *Walker*, 112 F.3d at 1132-33. The court has already determined that there is a genuine issue of material fact as to retaliation. If the defendants did retaliate against the plaintiff, it was because of his speech. It was clearly established in 2001 that government officials could not punish a public employee for his First Amendment speech.

Accordingly, Chief Wilder and Mr. Jones are not entitled to summary judgment on the basis of qualified immunity as to

the claims against them in their individual capacities. Their motion for summary judgment as to the claims against them in their individual capacities is DENIED.

The defendants also contend that they are entitled to summary judgment for the plaintiff's state law claims pursuant to the Georgia Constitution. The plaintiff has alleged that the defendants violated his right of free speech under Article I, Section I, Paragraph 5 of the Georgia Constitution. The basis of the defendants' motion as to the state law claims is that there is no procedural vehicle under state law for recovering damages resulting from alleged constitutional violations. Specifically, they assert that there exists no enabling statute—such as section 1983 in the federal context--which allows for a private cause of action for damages against counties for the alleged violation of the Georgia Constitution. The court has been unable to find any such statute, and the plaintiff does not cite any. As the defendants note, the Georgia Constitution does not confer any greater free speech rights than does the United States Constitution. *Cahill v. Cobb Place Associates*, 271 Ga. 322, 323, 518 S.E.2d 449, 450 (1999). The plaintiff's state claims, therefore, are, at most, duplicative of his federal claims. Because there is no enabling statute, the court will GRANT the defendants' motion for summary judgment as to the plaintiff's state law claims.

III. CONCLUSION

For the foregoing reasons, the defendants' motion for leave to file a brief in excess of the page limitation [Doc. No. 16] is GRANTED. The plaintiff's motion for leave to file a brief in excess of the page limitation [Doc. No. 19] is GRANTED. The plaintiff's motion for leave to file a notice of supplemental authority in opposition to the defendants' motion for summary judgment [Doc. No. 31] is DENIED. The defendants' motion for summary judgment [Doc. No. 14] is GRANTED IN PART and DENIED IN PART. The motion as

to the claims against DeKalb County, Georgia, is DENIED. The motion as to the claims against Vernon Jones and Scott B. Wilder in their official capacities is GRANTED. The motion as to the claims against Vernon Jones and Scott B. Wilder in their individual capacities is DENIED. The motion as to the state law claims is GRANTED.

SO ORDERED, this 17th day of June, 2002.

Robert L. Vining, Jr.
Senior United States District Judge

APPENDIX E

DEKALB COUNTY MERIT SYSTEM
HEARING OFFICER DECISION

NAME OF APPLICANT: James J. Travers

DATE OF HEARING: October 29, 2001

BACKGROUND: Suspension

Mr. James J. Travers (hereinafter referred to as "appellant") is employed with the Dekalb County Department of Public Safety, (hereinafter referred to as "department"). The appellant was suspended for thirty (30) days without pay effective August 5, 2001, pursuant to Chapter 20, Article IX, Section 20-190 of the Dekalb County Code. This action was taken in accordance with Chapter 20, Article IX, Section 20-191 of the Dekalb County Code, specifically:

1.) "Violation of Departmental Rules," as cause for disciplinary action, to wit: Department of Public safety Employee Manual Section 2.3.10; "Insubordination": Insubordination includes, but is not necessarily limited to any failure or deliberate refusal to obey a lawful order given by a superior or supervisor or any disrespectful, mutinous, insolent, or abusive language or action toward a superior whether in or out of the presence of the superior; and

2.) Section 2-3.60 "Conduct unbecoming-On/Off Duty Conduct:": Engaging in conduct on or off duty which adversely affects the morale or efficiency of the department and lor destroy confidence in the operation of the county service.

FINDINGS:

The hearing officer finds the following:

The appellant was employed with the Department, at all times relevant to the actions at issue. On May 14, 2001,

at around 9:00am the appellant was outside in front of the Maloof Administration Building participating in a picket demonstration.

As Dekalb County Chief Executive Officer (CEO) Vernon Jones exited the building, the appellant turned to Mr. CEO and in a loudly, menacingly and taunting manner began to repeatedly chant Mr. CEO's first name "Vernon. . . Vernon."

Mr. CEO approached the appellant and inquired whether he was a County employee. The appellant acknowledged that he was a County employee exercising his rights as a citizen. Mr. CEO told the appellant that while he did not mind that he was exercising his rights, he would not however tolerate his insubordinate actions. The appellant then said that he (the appellant) needed to take off his sunglasses so that he (the appellant) could look into Mr. CEO's eyes. Mr. CEO repeated that he would not tolerate the appellant's insubordinate actions and walked away.

The above incident was observed and corroborated by Mr. Morris Williams, Assistant County Administrator and Mr. Thomas Black, Director of Public Works.

As a result of the appellant's actions he was suspended for thirty (30) days without pay.

The appellant exercised his right to respond to this charge before Mr. Scott Wilder, the Fire Chief of the Department, within five (5) days. Mr. Wilder again reviewed all of the statements and found that the appellant did not furnish any new information that would justify a reversal of the termination. Therefore the suspension was upheld by the Fire Chief to be effective August 5, 2001 until September 4, 2001.

The appellant exercised his option to appeal the adverse action by filing a written request for appeal to the Merit System Director's Office for a County Merit System Hearing.

CONCLUSION:

The Hearing Officer, based upon the above findings of fact, hereby agrees with the department's action to suspend the appellant for thirty (30) days without pay effective August 5, 2001, pursuant to Chapter 20, Article IX, Section 20. 190 of the Dekalb County Code. This action was taken in accordance with Chapter 20, Article IX, Section 20.191 of the Dekalb County Code, specifically "Violation of Departmental Rules," as cause for disciplinary action, to wit:

Department of Public safety Employee Manual Section 2.3.10; , - "Insubordination" and Section 2.3.60 "Conduct unbecoming, On/Off Duty Conduct.." The above findings do not indicate any non-job related factor or any errors of fact that would reverse the department's decision to suspend the appellant.

James D. Brown Date 11/07/01 HEARING OFFICER
Dekalb County Merit System

APPENDIX F

DEKALB COUNTY

Employee Disciplinary Action Appeal
Administrative Procedures

1. Employee disciplinary action appeal hearings will be conducted by one (1) Hearing Officer selected from the Hearing Officer pool established by the Chief Executive Officer.

2. In that employee appeal hearings are administrative in nature, the Hearing Officer is not bound by strict court-room procedures as is normal for a judicial hearing. The following procedures will serve as guidelines to which both the employee (appellant) and department head or their attorneys, if represented, will follow when preparing for and presenting their cases before the Hearing Officer and to which the Hearing Officer will adhere when conducting hearings.

   A. The Hearing Officer shall hold a hearing within forty-five (45) days after receipt of the notice of appeal by the Merit System. The appellant, department head of the appellant, and the Hearing Officer shall be notified in writing of the date, time and location of the hearing at least fifteen (15) working days in advance of the hearing. Under unusual circumstances the Merit System Director may waive this fifteen (15) day notice period. All parties shall be afforded copies of the Personnel Chapter to the DeKalb County Code and these Administrative Procedures upon written request.

   B. The appellant will be allowed reasonable time off from regular duties to file the request for a hearing, obtain documents to be used at the hearing, and attend the hearing.

C. The appellant shall be entitled, upon request, to review his/her personnel files, both the file maintained by the Merit System Department and the file maintained by his/her department.

D. With respect to termination hearings, when the appellant is represented by an attorney, the County Attorney will appoint an attorney from the Law Department to represent the department. With respect to all other disciplinary hearings, when the appellant is represented by an attorney, the department may request, through the Merit System Director, that the department be represented by the Law Department. If the request is supported by the Merit System Director, the Law Department may provide representation if warranted by the nature of the case. If the appellant is represented by an attorney, the appellant shall be required to notify the Merit System Director of the name, address, and telephone number of their attorney within five (5) days from receipt of the notice of his/her hearing date. Failure to provide such timely notification will constitute the appellant's waiver of the forty-five day (45) deadline established to hear such appeal.

E. Authority to grant a continuance of the hearing rests with the Director of the Merit System. Requests for continuance must include a reason and be submitted in writing to the Director of the Merit System.

F. The appellant or his/her attorney may request in writing at least five (5) working days before the hearing that the Merit System Director notify those County employees the appellant desires to have testify at the hearing. The Merit System Director shall only be responsible for notifying current County employees that their attendance is requested, but cannot compel the attendance of the requested witnesses. The director

shall notify these employees that their presence is requested and that they will be afforded time off with pay during their attendance at the hearing, if the hearing takes place during their nonnal working hours.

G. Both appellant and department representative or their attorneys, if represented, shall, upon written request from one to the other received not later than ten (10) working days prior to the hearing, exchange a list of all potential witnesses who may/will testify on their behalf and a list of all documents and provide access to review or copy all documents that may/will be used during the hearing. The witness and document list/ copies must be provided not later than five (5) working days preceding the date of the hearing.

H. The Merit System Director or designee will announce the purpose of the hearing and answer any procedural questions before turning the hearing over to the Hearing Officer.

I. Upon objection by appellant or the department, no documentation will be entered into evidence or witnesses allowed to testify at the hearing that have not been provided pursuant to paragraph G above.

J. The Hearing Officer shall have the right to strike any testimony or disallow admittance of any document that he/she determines not to be relevant to the disciplinary action taken.

K. The Hearing Officer shall have the right to question all witnesses and to obtain clarification of any document or testimony presented.

L. Witnesses for both appellant and department who may/will offer testimony shall do so under oath, which will be administered by the Hearing Officer at the beginning of the hearing. Witnesses not sworn at this time shall be sworn prior to testifying.

M. The Hearing Officer shall consider any special requests prior to presentation of evidence/testimony (i.e., invoking the rule of sequestration, procedural questions not addressed by Administrative Procedures, etc.)

N. Both appellant and department representative or their attorneys, if represented, shall identify and number all documents they desire to submit as evidence as exhibits ("appellant exhibits" and "department exhibits") and present three (3) copies to the Hearing Officer at the start of the hearing.

O. Brief opening and closing statements by the parties shall be allowed, if requested by the parties. The department or its attorney shall present its opening statement first. The department shall have the right to both open and close during closing argument. The department may elect to waive its opening portion of closing argument and present its entire closing argument following appellant's closing argument.

P. The department or its attorney shall present evidence supporting the disciplinary action taken. The appellant or appellant's attorney shall have an opportunity to question witnesses of the department relative to all matters raised in the disciplinary action letter and evidence presented by the department. The appellant or appellant's attorney will then have an opportunity to present evidence in support of the request for reversal. The department or department's attorney shall have an opportunity to question witnesses of appellant relative to the evidence presented by the appellant. The department shall have the right to introduce rebuttal evidence in support of its case that the hearing officer deems relevant and pertinent to the issues raised by

the appellant. Such rebuttal evidence shall include the right to introduce unidentified rebuttal documents or call unidentified rebuttal witnesses.

Q. After the department and appellant or their attorneys have completed the presentation of their cases, the Hearing Officer will adjourn the hearing.

3. The Hearing Officer shall issue the written decision as soon as possible, but in no event more than twenty (20) days from the conclusion of the hearing and provide same to the Merit System Director, who will forward a copy of the Hearing Officer's decision to all parties concerned. The Hearing Officer may reverse an action only upon a finding that the action was based upon an error in fact or was motivated by a non job-related factor. The written decision shall contain findings of fact and conclusions and shall clearly set forth the grounds for such decision.

4. The Hearing Officer's decision may be reviewed by the Merit System Council upon timely application filed with the Merit System Director. The review by the Merit System Council shall be solely from the record created by the Hearing Officer. The Merit System Council may not reverse the decision of the Hearing Officer unless it determines that such findings of fact or conclusions were clearly erroneous. The Merit System Council shall render a decision in writing within thirty (30) days from the date the application for review is filed in the Merit System to either affirm or reverse the decision of the Hearing Officer. If the Merit System Council does not issue a decision within thirty (30) days from the date of the application for review is filed, the decision of the Hearing Officer will stand as affirmed.

APPENDIX G

DEKALB COUNTY CODE OF ORDINANCES
CHAPTER 20—PERSONNEL

Sec. 20-190. Authority for disciplinary action and discharge.

The chief executive, as the chief administrative officer of the county, shall have the authority to impose disciplinary actions and to dismiss employees as provided in this article. In addition, disciplinary action may be taken against an employee or an employee may be dismissed by the head of the department to which the employee is assigned. An employee's supervisor may propose disciplinary action or dismissal, but before the same shall become final, it must be reviewed and approved by the department head.

(Code 1976, § 2-3144)

Sec. 20-191. Causes for dismissal or disciplinary action.

Cause for dismissal and disciplinary action shall include but not be limited to the following:

(1) Violation of any material provision of this chapter, or other personnel rules and regulations, and any violation of section 20-20 (conflicts of interest) and section 20-20.1 (financial disclosure forms) of this chapter.

(2) Substandard work quality.

(3) Improper use of county equipment or property.

(4) Selling or soliciting on county property without prior authorization.

(5) Unauthorized use of telephone or other county communication equipment.

(6) Conduct unbecoming an employee of the county while on duty.

(7) Leaving the work area without permission from the supervisor.

(8) Failure to call in when sick or absent from work otherwise without prior approval.

(9) Neglect, carelessness or disregard of common safety practices.

(10) Violation of departmental rules.

(11) Malicious mischief, horseplay, wrestling, or other undesirable conduct.

(12) Falsifying any official record or document.

(13) Giving a false answer or false information on application.

(14) Habitual unexcused tardiness.

(15) Loafing, neglect of duties or otherwise wasting of working time.

(16) Sleeping during working hours except where conditions of work authorize and warrant it.

(17) Possession of intoxicating beverages or controlled substances at place of work, or in official county vehicles.

(18) Possession of or bringing a firearm or other deadly weapon on county property or an official county vehicle, unless duly authorized by the department head.

(19) Reporting to work under the influence of intoxicating beverages, or drugs not prescribed by a physician.

(20) Fighting, threatening, intimidating, coercing or otherwise interfering with the rights of other employees.

(21) Gambling on county property.

(22) Insubordination or willful failure to carry out an official supervisory directive or job assignment.

(23) Acceptance of a fee, gift or service of any item of value in return for a favor.

(24) Loss or damage of county property through carelessness or negligence.

(25) Violation of a safety rule which results in personal injury or property damage; refusal to use proper safety equipment when provided.

(26) Failure of supervisor to enforce established safety regulations, or requiring employee to perform unsafe act.

(27) Excessive absenteeism.

(28) Exhaustion of annual leave without prior approval.

(29) Abuse of sick leave.

(30) Misappropriation of county funds or illegal sale or disposal of county property for personal gain, or deliberate falsification of official reports, employment application or misrepresentation of personnel information in order to qualify for appointment or promotion.

(31) Conviction of a felony crime, or a misdemeanor involving serious moral turpitude.

(32) Engaging in a strike, work stoppage, slowdown or act of sabotage.

(33) Substantial incompetence or inefficiency in carrying out work assignments.

(34)Failure to report for work without prior approval, except when sick leave is authorized.

(35) Stealing or similar conduct, including destroying, damaging or concealment of any property of the county.

(36) Willful damage of or attempt to damage county property.

(37) Threatening physical violence or striking a supervisor or subordinate.

(38) Operation of any county-owned or county-leased vehicle or equipment without proper state license or while under the influence of any medication or drug which has been prescribed by a doctor and which carries the warning not to drive or operate machinery while using same.

(Code 1976, § 2-3145; Ord. No. 10-02, Pt. II, 11-27-01)

Sec. 20-193. Review of disciplinary action (appeals).

A permanent status employee aggrieved by any suspension, demotion, or termination may appeal such aggrieved action to a hearing officer as outlined below:

(1) All requests for review of disciplinary actions shall be filed in writing with the director within (10) days from the effective date of the disciplinary action.

(2) A hearing officer shall be assigned, pursuant to the administrative procedures, to hear said appeal within forty-five (45) days after it is filed, during which time said hearing will convene to afford the aggrieved employee a hearing before said hearing officer, which may be continued from time to time, to fully explain his or her conduct for which he or she was disciplined.

(3) The hearing officer may reverse a disciplinary action only upon a finding that it was based upon an error in fact or was motivated by a non-job-related factor.

(4) The hearing officer shall issue a written decision within twenty (20) days of the hearing. The decision of the hearing officer shall be in writing, dated and signed. The written decision shall contain the findings of fact, the conclusions and, clearly set forth the basis or grounds for the decision.

(Code 1976, § 2-3148; Ord. No. 00-75, § 4, 7-25-00)

Sec. 20-194. Review of action considered discriminatory against employee.

Any employee who believes unjust discrimination has been exercised with respect to any disciplinary action because of race, color, religion, national origin, sex, political affiliation, or opinion, age, sexual orientation, or disability may appeal to a hearing officer within ten (10) days from the effective date of the action. Such appeal shall be filed with the director and set forth in detail the reasons why the employee contends the disciplinary action was based upon discrimination, including specifying the dates, times, places, and specific types of each instance of discrimination alleged. In such cases, the hearing officer may reverse the decision of the department head only on a finding that it was based on error of fact or was motivated by intentional discrimination against the employee because of membership in a protected class listed in this section. The same provisions relative to the hearing officer as outlined in section 20-193 shall also apply in the case of an employee discrimination appeal under this section.

(Code 1976, § 2-3149; Ord. No. 91-04, § 1, 2-26-91; Ord. No. 00-75, § 5, 7-25-00)

APPENDIX H

DEKALB COUNTY CODE OF ORDINANCES
APPENDIX B— LOCAL CONSTITUTION
ARTICLE XVI— PERSONNEL

Sec. 1055. Same—Duties.

(a) The merit system council, when requested by the Chief Executive Officer, may hold public meetings regarding proposed rules and regulations and standards of the merit system and thereafter recommend to the board of commissioners the adoption of rules and regulations and standards affecting the merit system established under this Act. Said board of commissioners may adopt a personnel code which may include provisions for the establishment and maintenance of job classification and compensation plans, the conduct of examinations for appointment under the merit system, the certification of eligible persons, appointments, promotions, transfers, demotions, separations, tenure, service ratings, reinstatements, appeals, and such additional regulations as may be deemed to be in the best interest of impartial selection of efficient personnel and improvement of public administration. The rules and regulations may provide for the establishment of a register of persons eligible for appointment under the merit system, provided that no elected county officers shall be required to choose personnel solely from said register, but the personnel employed by such a county officer shall be processed in accordance with such rules and regulations as may be adopted. Said personnel code, rules and regulations when approved and adopted by the board of commissioners shall have the force of law and be binding upon all departments and offices of the county enumerated in the resolution creating the merit system as to all personnel subject to the jurisdiction of the board of commissioners.

(b) The Chief Executive Officer is authorized to implement the personnel code and the rules and regulations adopted by the board of commissioners by such procedures and rules as he or she deems appropriate, and to provide for the review of personnel actions in such manner as he or she deems appropriate, consistent with the policies established by the board of commissioners.

1. For the review of appeals pertaining to disciplinary actions (dismissal, demotion or suspension) of permanent classified employees for cause, the chief executive officer shall establish a pool of persons eligible to serve as hearing officers. A hearing officer's review shall afford the employee the right to present evidence and to be heard in the manner and under such rules, regulations and administrative procedures as may be prescribed by the Chief Executive Officer or designee and outlined in the formal, written Administrative Procedures To The Personnel Chapter Of The DeKalb County Code. Within budgetary limitations, compensation of persons serving as hearing officers shall be set forth in the Administrative Procedures To The Personnel Chapter Of The DeKalb County Code, but in no event shall the hearing officer be a current official or employee of DeKalb County or have been an official or employee of DeKalb County within ten years prior to serving as a hearing officer. In the discretion of the Chief Executive Officer, the approval of the board of commissioners may be sought for any and all such procedures.

2. A person serving as a hearing officer shall possess the qualifications from either of the following:

a. Baccalaureate degree in personnel administration, labor relations, public administration, political science or business administration, and a minimum of three (3) years experience in investigating or reviewing employment grievances or similar complaints; OR

b. Admitted to the practice of law in the State of Georgia and an active member of the State Bar of Georgia, plus a minimum of two (2) years experience in the practice of law.

(c) The merit system council shall keep and maintain an accurate record of minutes and shall be authorized to hire a clerk to keep and maintain its minutes, the compensation of such clerk to be set by the governing authority of said county.

(d) Said council shall be authorized to make recommendations as to amendments, additions to and changes in said rules and regulations from time to time and when said amendments, changes or additions are adopted by the board of commissioners, said amendments shall have the force of law and be binding on all parties affected by said merit system. A simple majority of the council members shall constitute a quorum for the conduct of any hearing or business to be transacted by the council. Action of the council shall be by vote of a majority of members present at a meeting where a quorum is present.

(Acts 1956, p. 3111, § 4; Ord. No. 82-26, §§ II, III, 3-9-82; Ord. No. 95-02, § 1, 4-11-95; Ord. No. 84-00, § III, 8-8-00)

Supreme Court, U.S.
FILED
SEP 29 2003
OFFICE OF THE CLERK

No. 03-321

In The Supreme Court of the United States

JAMES J. TRAVERS,

Petitioner,

v.

VERNON JONES, Individually and in his Official Capacity as Chief Executive Officer of DeKalb County, Georgia; and SCOTT B. WILDER, Individually and in his Official Capacity as Fire Chief of DeKalb County, Georgia,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. Should this Court grant certiorari to consider Petitioner's claim that the Court of Appeals failed to follow binding Georgia precedent where the Petitioner failed to raise before the Eleventh Circuit Court of Appeals the issue of whether the case law relied upon by the Respondent was binding precedent?

II. Did the Eleventh Circuit Court of Appeals correctly apply *University of Tennessee v. Elliot*, 478 U.S. 788, 106 S.Ct. 3220, 92 L.Ed.2d 635 (1986) in denying Petitioner's request to relitigate in federal court facts previously presented and determined at a state administrative hearing?

LIST OF PARTIES

The names of the parties listed in Travers' Petition for a Writ of Certiorari are incorrect to the extent that they reference official capacity claims against Vernon Jones and Scott B. Wilder. Official capacity claims against both of these individuals were dismissed by the District Court on their Motion for Summary Judgment. (Petitioner's App. D, 25a).

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STATEMENT OF THE CASE

The Petitioner James J. Travers (hereinafter "Travers"), is a firefighter employed by DeKalb County, Georgia. The underlying issue in this case is the propriety of a thirty-day suspension issued to Travers, and his claims for back pay and attorney's fees therefor. Travers is a member of the International Association of Firefighters, ("IAAF") Local 1492 and serves as a Trustee. In March 2001, DeKalb County firefighters began a picket at the Manuel Maloof Administration Building, the County's administrative offices in Decatur, Georgia, in connection with alleged pay disparity arising from the implementation of a pay study. (Petitioner's App. D, 12a).

On May 14, 2001, Travers was picketing outside of the Manuel Maloof Building on the sidewalk. (Petitioner's App. D, 12a). In addition to Travers, there were other people picketing in connection with separate concerns about a county ordinance. (Petitioner's App. D, 13a). Respondent Vernon Jones, Chief Executive Officer of DeKalb County, Georgia (hereinafter "Jones"), was walking a short distance from one county administration building to another. (Petitioner's App. D, 13a). Travers loudly chanted Jones' name shouting "Vernon, Vernon." (Petitioner's App. E, 27a). Jones and at least two other county employees who heard the name-calling, Morris Williams and Thomas Black, perceived it as taunting Jones. (Petitioner's App. E, 27a). Jones went over to where Travers was standing and told him that he, Travers, was being insubordinate. (Petitioner's App. D, 13a-14a). During the course of that brief encounter, Travers said that he needed to take off his sunglasses so that he could look into Jones' eyes. (Petitioner's App. A, 4a, Petitioner's App. D, 14a, App. E, 27a). Both Jones and Morris Williams, the

Assistant County Administrator who was standing in close proximity to Travers and Jones at the time of the incident, perceived the manner in which Travers removed his glasses in a negative light. (Petitioner's App. D, 14a).

At all material times, Respondent Chief Scott B. Wilder (hereinafter "Chief Wilder") was the Acting Director of the DeKalb County Fire and Rescue Services Department. He was the head of the department and was authorized to impose discipline pursuant to the county's personnel code (subject to civil service appeal), Code of DeKalb County, § 20-190. (*See* Petitioner's App. G). Subsequent to Travers' encounter with Jones, Chief Wilder met with Travers on or about May 16, 2001 to discuss the incident. (Petitioner's App. D, 14a). Thereafter, Chief Wilder wrote to notify Travers of proposed discipline against him and the reasons for taking such action. Specifically, the letter stated that Travers would be suspended for thirty (30) days because of Travers' "insubordination" and "conduct unbecoming-on/off duty." Travers was advised of his right to appear before Chief Wilder to respond, his right of appeal and his right to a hearing before a merit system (civil service) hearing officer. (Petitioner's App. D, 14a). The charges against Travers were based on his conduct towards Jones on May 14, 2001. (Petitioner's App. D, 14a). The County has never disciplined any other individual or proposed discipline against anyone for any conduct or actions that occurred during any picketing or protests. (Petitioner's App. A, 2a).

On June 29, 2001, Travers initiated this civil rights action in the United States District Court for the Northern District of Georgia against DeKalb County, Jones in his individual and official capacities, and Chief Wilder in his

individual and official capacities pursuant to 42 U.S.C. § 1983 and state law. Travers alleges in his Complaint that he was disciplined because he engaged in union activity and that such discipline was retaliatory and violated his rights under the First Amendment of the United States Constitution and under Article I, Section I, Paragraph 5 of the Constitution of the State of Georgia. (Petitioner's App. D, 15a and 16a).

Simultaneously with initiating the present litigation in District Court, Travers appealed his discipline to a merit system hearing officer. (Petitioner's App. D., 15a). Travers' hearing before the merit system hearing officer was conducted in accordance with the Code of DeKalb County, Appendix B, § 1055 and the administrative procedures provided for therein. (*See* Petitioner's Appendices F and G). The hearing officer has the power to reverse a disciplinary action if he or she finds that the discipline was motivated by a non-job-related factor or that the decision to discipline was based on an error in fact. (Petitioner's App. D, 15a). At his merit system appeal hearing, Travers was represented by counsel.[1] (Petitioner's App. A, 4a). The merit system hearing officer heard Travers' appeal and subsequently issued a decision denying the appeal and upholding Chief Wilder's decision to suspend Travers. (Petitioner's App. A, 4a). The hearing officer found, as expressed in his written decision, that Travers had repeatedly chanted Jones' first name "in a loudly, menacingly and taunting manner." The hearing officer

[1] Travers has been represented by his lead counsel in this appeal since the initiation of this litigation and was represented by lead counsel's associate at the hearing before the hearing officer.

further stated that his findings did not indicate any non-job-related factor or any errors of fact that would reverse the department's decision to suspend Travers. (Petitioner's App. E, 26a-28a). Travers did not appeal the hearing officer's decision to state court.

Jones, Chief Wilder, and DeKalb County[2] filed a Motion for Summary Judgment before the District Court below. (Petitioner's App. D, 17a). Jones and Chief Wilder asserted qualified immunity as one of their defenses to the individual capacity claims against them. The District Court granted summary judgment with respect to the County, Jones, and Chief Wilder for all of the state constitutional claims and for the federal constitutional claims against Jones and Chief Wilder in their official capacities. (Petitioner's App. D, 18a). The District Court denied summary judgment to the County, and to Jones and Chief Wilder in their individual capacities, with respect to the federal constitutional claims. (Petitioner's App. D, 23a-24a). Jones and Chief Wilder filed an interlocutory appeal with the Eleventh Circuit Court of Appeals with respect to the denial of qualified immunity. The Court of Appeals accepted interlocutory jurisdiction pursuant to *Mitchell v. Forsyth*, 472 U.S. 511, 528, 105 S.Ct. 2806, 2816, 86 L.Ed.2d 411 (1985). Travers initially sought to have the appeal dismissed on jurisdictional grounds, but the Eleventh Circuit Court of Appeals denied Travers' Motion to

[2] The action against the County remains, pending the outcome of this Petition.

Dismiss.[3] The Eleventh Circuit reversed the District Court's denial of summary judgment and granted qualified immunity to Jones and Chief Wilder.

Travers' Statement of The Case contains a number of factual misstatements that Jones and Chief Wilder must bring to the Court's attention. Most significantly, Travers indicates that the issue of fact preclusion was not properly before the Eleventh Circuit. Specifically, Travers misstates the facts by characterizing the Court as having reached the issue *sua sponte*. (Petitioner's Brief, p. 8). The following discussion illustrates the fallacy of that statement.

The Eleventh Circuit invoked the doctrine of fact preclusion in direct response to argument from Jones and Chief Wilder. It was not *sua sponte*. The Eleventh Circuit first set out the facts in its order and identified, as had the District Court before it, that the merits of the case ultimately turned on whether the plaintiff's or defendant's version of the facts were correct. (Petitioner's App. A, 3a). The Eleventh Circuit next took the proper course and held that the application of the doctrine of fact preclusion in this case dictated the version of facts that must be considered in deciding the issue of qualified immunity. The Eleventh Circuit acknowledged that there was no dispute as to whether Jones and Chief Wilder were acting within their discretionary authority. The Eleventh Circuit began its analysis with the determination that Travers had the

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[3] Petitioner's principal appellate Brief focused heavily on his argument that the Eleventh Circuit did not have interlocutory jurisdiction.

burden to show that qualified immunity was inappropriate. (Petitioner's App. A, 3a) (citing *Lee v. Ferraro*, 284 F.3d 1188, 1194 (11th Cir. 2002)). Travers had to allege facts to show that the government official's conduct violated a clearly established constitutional right. (Petitioner's App. A, 3a). The Eleventh Circuit recognized that there is clearly established law which prohibited an employer from demoting or discharging a public employee for engaging in protected speech (citing to *Rankin v. McPherson*, 483 U.S. 378, 383, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987). However, the Eleventh Circuit also cited to its own circuit case law for the proposition that the First Amendment does not require a public employer to tolerate insubordination (citing *Morris v. Crow*, 117 F.3d 449, 458 (11th Cir. 1997)).

Applying the principle set forth in *Rankin* to Travers' version of the facts, the Eleventh Circuit stated that Travers' speech was protected. The Eleventh Circuit also recognized that under Jones and Chief Wilder's version of facts, Travers was insubordinate and engaged in conduct unbecoming. The Eleventh Circuit stated the general proposition that qualified immunity must be denied when there are issues of fact because courts must view the facts in the light most favorable to the plaintiff, but in invoking the doctrine of fact preclusion, the Eleventh Circuit held that fact preclusion resolved all issues of fact between the parties. (Petitioner's App. A, 4a). Based on the now-undisputed facts, the Eleventh Circuit held that Jones and Chief Wilder did not engage in any unconstitutional conduct. Jones, Chief Wilder and DeKalb County have raised the doctrine of fact preclusion in every substantial brief filed at every stage of this litigation, beginning with the filing of their Motion for Summary Judgment in the

District Court. (Petitioner's App. A, 18a). Fact preclusion was set forth as the first issue in Jones' and Wilder's initial appellate Brief to the Eleventh Circuit.[4] Travers' assertion that the Eleventh Circuit's review of the District Court's refusal to give preclusive effect to the administrative hearing officer's findings was *sua sponte* is, at a minimum, plainly erroneous or, at worst, disingenuous. As illustrated herein, Travers misstates the facts by mischaracterizing the manner in which the Eleventh Circuit reached the issue of fact preclusion. It was part of the core legal issues to be addressed in considering qualified immunity.

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[4] Travers did not squarely address the fact preclusion argument in his initial brief to the Eleventh Circuit, but rather spent much of his briefing pursuing the argument that the Eleventh Circuit did not have interlocutory jurisdiction of the appeal. While Jones and Chief Wilder relied on *Jordan v. Board of Pub. Safety*, 253 Ga. App. 339, 559 S.E.2d 94 (2002) and *Blackwell v. Georgia Real Estate Commission*, 205 Ga. App. 233, 421 S.E.2d 716 (1992) from the inception, Travers did not initially argue to the Eleventh Circuit that *Flournoy v. Akridge*, 198 Ga. App. 86, 400 S.E.2d 649 (1990) (as opposed to *Jordan*) was the applicable Georgia law to be considered in deciding whether fact finding by the merit system hearing officer should be given preclusive effect in a § 1983 case. Jones and Chief Wilder contend that Travers has waived his right to argue that *Flournoy* is the applicable Georgia precedent. This argument is addressed more fully herein.

REASONS FOR DENYING THE WRIT

I. THIS COURT SHOULD DECLINE TO GRANT REVIEW TO CONSIDER TRAVERS' CLAIM THAT THE ELEVENTH CIRCUIT FAILED TO FOLLOW BINDING PRECEDENT BECAUSE TRAVERS DID NOT INITIALLY RAISE BEFORE THE ELEVENTH CIRCUIT THE ISSUE OF WHETHER THE CASE LAW RELIED UPON BY THE RESPONDENT WAS BINDING GEORGIA PRECEDENT.

Travers asks this Court to grant certiorari to review his contention that the Eleventh Circuit Court of Appeals failed to follow binding Georgia precedent in determining the fact preclusive effect of an unreviewed administrative hearing. Travers contends that *Flournoy v. Akridge*, 198 Ga. App. 86, 400 S.E.2d 649 (1990) is binding Georgia law concerning fact preclusion and that the Court of Appeals reliance on *Jordan v. Board of Public Safety*, 253 Ga. App. 339, 559 S.E.2d 94 (2002); and *Blackwell v. Georgia Real Estate Commission*, 205 Ga. App. 233, 421 S.E.2d 716 (1992) was misplaced because neither of the cases are binding precedent.

In so arguing, Travers' makes an argument to this Court in pursuit of review of the Eleventh Circuit's decision that he did not make before the Eleventh Circuit. Jones and Chief Wilder made the tact preclusion argument the cornerstone of their defenses of this action.[5] Jones and

[5] Jones, Chief Wilder, and DeKalb County have also contended in the alternative throughout the course of this litigation that they are entitled to summary judgment even absent the doctrine of fact preclusion.

Chief Wilder have relied on *Jordan*, *supra* and *Blackwell*, *supra* from the inception of their pursuit of qualified immunity. Jones and Chief Wilder first raised the fact preclusion argument in their Motion for Summary Judgment and addressed it thereafter through the Court of Appeals. Travers raised *Flournoy* in his Brief in Opposition to Jones and Chief Wilder's Motion for Summary Judgment in District Court, to which Jones, Chief Wilder and the County made a reply. However, while Jones and Chief Wilder made a cursory discussion of *Flournoy* in their principal appellate brief in anticipation of that issue being raised by Travers in his appellate brief to the Eleventh Circuit, that expectation did not materialize. In response to Jones and Chief Wilder's principal brief to the Eleventh Circuit, Travers did not raise the argument that *Jordan* and *Blackwell* were not applicable precedent and that *Flournoy* was the applicable binding present.[6]

A prevailing party may urge any ground in support of the judgment, whether or not that ground was relied upon or even considered by the court below. *See e.g. United States v. New Telephone Co.*, 434 U.S. 159, 166 n. 8, 98 S.Ct. 364, 369 n. 8, 54 L.Ed.2d 372 (1977); *Dandridge v. Williams*, 397 U.S. 471, 475-476, n. 6, 90 S.Ct. 1153, 1156-1157, n. 6, 25 L.Ed.2d 491 (1970). However, as a general rule, this Court "will not consider a claim that was not presented to the courts below." *Jenkins v. Anderson*, 447 U.S. 231, 234 n. 1 (1980). This Court has maintained firm

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[6] Petitioner raised the issue for the first time on appeal in his Petition for Rehearing and Rehearing En Banc. (Resp. App. A, 12 n. 1). Petitioner was forthright in his admission that he had failed to cite *Flournoy* in his initial brief to the Court.

adherence to this rule. *TRW, Inc. v. Andrews*, 534 U.S. 19, 122 S.Ct. 441, 151 L.Ed.2d 339 (2001) is a very recent example of the application of this rule.

In *TRW, Inc.*, the respondent, a consumer, sued a credit reporting agency for damages and injunctive relief alleging that the agency violated the Fair Credit Reporting Act ("FCRA") and California law by furnishing her credit reports to requesting companies in connection with credit application by impostors and failing to maintain reasonable procedures to ensure the accuracy of reports. The consumer presented for the first time before this Court an alternative argument regarding the meaning of the statute of limitations set forth in Section 1681 of the FCRA. *TRW, Inc.*, 534 U.S. at 33. In declining to consider the argument, this Court, with minimal explanation or analysis, stated, "[W]e do not reach this issue because it was not raised or briefed below." Similarly, Travers did not advance his "*Flournoy* is the law in Georgia" argument in the Eleventh Circuit until his Amended Petition for Rehearing. The issue that is now presented to this Court should have been presented to the Eleventh Circuit in its initial consideration of the case.

In *United States v. Martinez*, 96 F.3d 473 (11th Cir. 1996), *cert. denied*, *Martinez v. United States*, 519 U.S. 1133, 117 S.Ct. 998, 136 L.Ed.2d 877 (1997), the Eleventh Circuit opined that it does not consider issues or arguments raised for the first time on petition for rehearing. *United States v. Richards,* 646 F.2d 962, 963 (5th Cir. 1981) ("[A]bsent exceptional circumstances we do not consider issues that are first presented in an application

for rehearing"); *United States v. Sutherland*, 428 F.2d 1152, 1158 (5th Cir. 1970).[7] *See* also *Dunkins v. Thigpen*, 854 F.2d 394, 399 n. 9 (11th Cir.) (on a petition for rehearing the court declined to consider an argument not previously raised on appeal).

In the case at bar, although the Eleventh Circuit did not issue an opinion in its denial of Travers' Amended Petition for Rehearing, the above cited case law indicates that the Eleventh Circuit could have properly determined that it could not entertain Travers' argument regarding *Flournoy*. As a consequence of Travers' failure to initially brief this issue to the Eleventh Circuit, this Court lacks the benefit of the views of the lower court. Accordingly, Travers' argument should not be considered here. Because Travers essentially failed to raise this argument in the lower appellate court by failing to raise it in response to Jones and Chief Wilder's principal appellate Brief, this Court should deny the instant Petition for Certiorari.

In addition, the Federal Rules of Appellate Procedure, Rule 28(b) expressly invite and encourage an appellee to include a statement of the issues if the appellee is dissatisfied with the appellant's statement of the issues. Travers submitted a statement of the issues, but he did not raise therein the issue of *Flournoy* being the applicable binding precedent. That Travers failed to avail himself of that opportunity should not be the basis of this Court now

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[7] In *Bonner v. City of Pritchard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (*en banc*), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

granting him the extraordinary relief that the grant of a Petition for Certiorari to this Court constitutes.

Finally, the Rules of this Court provide that "a petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 12. Travers concedes that *University of Tennessee v. Elliot*, 478 U.S. 788, 106 S.Ct. 3220, 92 L.Ed.2d 635 (1986) required the Eleventh Circuit to examine state law in deciding whether to give a state officer's decision preclusive effect with respect to the factual findings in § 1983 litigation. (Petitioner's Brief, p. 11). The Eleventh Circuit followed Georgia law by applying *Jordan* and *Blackwell*, but Travers contends that the Eleventh Circuit did not follow the **correct** binding Georgia law. Essentially, Travers argues that this Court's properly stated rule in *Elliot* was misapplied as a consequence of the Eleventh Circuit's reliance on *Jordan* and *Blackwell* as opposed to *Flournoy*.[8] Under the stated policy of this Court in its Rules, this is precisely the kind of case for which certiorari should not be granted.

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[8] Jones and Chief Wilder do not concede that *Flournoy* is the binding Georgia precedent that the Eleventh Circuit should have applied in determining the state of the law in Georgia concerning fact preclusion. If this Court grants Travers' Petition, Jones and Chief Wilder will demonstrate that both *Jordan* and *Blackwell* are more recent Georgia decisions concerning fact preclusion and that these decisions were correctly applied in the case at bar. In addition, although *Jordan* and *Blackwell* appear to conflict with *Flournoy's* apparent holding that fact preclusion does not apply in § 1983 claims, if this Court grants Travers' Petition, Jones and Chief Wilder will demonstrate that *Flournoy* was, at best, decided on its facts or is, at worst, an anomaly.

II. THE ELEVENTH CIRCUIT'S APPLICATION OF *UNIVERSITY OF TENNESSEE V. ELLIOT* TO THE FACTS OF THE CASE AT BAR IS NOT A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF PROCEEDINGS.

In his desperation to have this Court re-examine the facts of the case at bar, Travers erroneously attempts to cast the Eleventh Circuit's order as "effectively [barring] access to the federal courts [for] all public employees in Georgia who pursue administrative remedies offered by their employers." (Petitioner's Brief, pp. 8-9). As stated above, Travers arrives at this drastic conclusion by contending that the Eleventh Circuit ignored binding Georgia precedent and wrongly extended this Court's decision in *Elliot, supra*. As argued more fully below, the Eleventh Circuit's application of *Elliot* to the facts in the case at bar is consistent both with *Elliot's* holding and how *Elliot* has been applied in every federal district. Therefore, Jones and Chief Wilder request that this Court deny Travers' Writ and affirm the decision of the Eleventh Circuit.

In the case at bar, the Eleventh Circuit reversed the District Court and held that Travers had a full and fair opportunity to litigate the facts surrounding his confrontation with Jones at his administrative hearing. The Eleventh Circuit cited *Elliot* for the proposition that federal courts must give a state agency's findings of fact the same preclusive effect as that entitled in state courts as long as the state agency is acting in a judicial capacity and resolving disputed issues of fact properly before it. The Eleventh Circuit properly found that, under Georgia law, "once an administrative body rules on questions of fact, the questions of fact are thereafter precluded from litigation."

Travers v. Jones, 323 F.3d 1294, 1296 (11th Cir. 2003) *citing Jordan, supra*; *Blackwell, supra*.[9]

A review of circuit decisions dating from 1986 to the present reveals that every federal judicial circuit applies *Elliot* in the same manner as was applied by the Eleventh Circuit in the case at bar. *See Bath Iron Works Corp. v. Director, Office of Workers' Comp. Programs, U.S. Dept. of Labor*, 125 F.3d 18 (1st Cir. 1997) (State law's treatment of agency findings as proper basis for precluding relitigation supports collateral estoppel effect to prior workers' compensation proceedings); *Pappas v. Guiliani*, 118 F.Supp.2d 433 (2nd Cir. 2000) (State law mechanism of issue preclusion also applies to unreviewed state agency fact determinations in § 1983 civil rights actions); *Crossroads Cogeneration Corp. v. Orange & Rockland Utilities, Inc.*, 159 F.3d 129 (3rd Cir. 1998) (Litigation under Public Utility Regulatory Policies Act not exempt from state law rules of preclusion in subsequent litigation); *Layne v. Campbell County Dept. of Social Services*, 939 F.2d 217 (4th Cir. 1991) (Federal court did not have authority to review factfinding of administrative panel since state court would be precluded from doing so); *Frazier v. King*, 873 F.2d 820 (5th Cir. 1989) (State law did not recognize doctrine of collateral estoppel therefore plaintiff was not precluded from bringing § 1983 suit, but facts of fully litigated case were binding on parties); *Featherstone v. Columbus Public Schools*, 39 F.Supp.2d 1020 (S.D. Ohio 1999) (State law prohibited plaintiff a second chance to

[9] As argued above, Petitioner's failure to raise his argument that Georgia law does not allow fact preclusion in § 1983 cases in the lower court bars him from raising this argument before this Court.

relitigate facts surrounding his termination, therefore federal court was required to give the same preclusive effect to factual determinations of state administrative hearing); *Brown v. J.J. Case Co.*, 813 F.2d 848 (7th Cir. 1987) (State law of res judicata prevented plaintiff from relitigating claim of discrimination in federal court); *Yancy v. McDevitt*, 802 F.2d 1025 (8th Cir. 1986) (State law of issue preclusion prevented plaintiff from relitigating facts in decision of administrative agency); *Eilrich v. Remas*, 839 F.2d 630 (9th Cir. 1988) (Plaintiff's full and fair opportunity to litigate factual circumstances in administrative hearing prevented him from relitigating the same facts in federal court); *Long v. Laramie County Comm. College District*, 840 F.2d 743 (10th Cir. 1988) (State law of collateral estoppel prevented plaintiff from relitigating findings of fact found by Board of Trustees). Travers' mischaracterization of the Eleventh Circuit's ruling as "barring access to federal courts" is totally unsupported by law or fact and is an argument expressly discussed and rejected by this Court in *Elliot*.

In *Elliot*, this Court analyzed and balanced the presumptive effect to be given the judgments and records of state courts against the investigatory process and procedures of 42 U.S.C. § 2000e-5 and Title VII. This Court cited *Chandler v. Roudebush*, 425 U.S. 840, 96 S.Ct. 1949, 48 L.Ed.2d 416 (1976) as "strong support" that Congress intended government employees to have a trial *de novo* in federal court on Title VII claims. This Court reiterated that "the legislative history of the 1972 amendments reinforces the plain meaning of the statute and confirms that Congress intended to accord federal employees the same right to a trial *de novo* [following administrative proceedings] as is enjoyed by private-sector employees

and employees of state governments and political subdivisions under the amended Civil Rights Act of 1964." *Elliot*, 478 U.S. at 796, 106 S.Ct. at 3224 *citing Chandler*, 425 U.S. at 848, 96 S.Ct. at 1953. Not content to end its inquiry there, this Court also examined its own precedent and held that "nothing in the language of § 1983 remotely expresses any congressional intent to contravene the common-law rules of preclusion or to repeal the express statutory requirements of the predecessor of 28 U.S.C. § 1738 . . . Moreover, the legislative history of § 1983 does not in any clear way suggest that Congress intended to repeal or restrict the traditional doctrines of preclusion." *Allen v. McCurry*, 449 U.S. 90, 97-98, 101 S.Ct. 411, 416, 66 L.Ed.2d 308 (1980). Travers' desired interpretation of *Elliot* would achieve exactly what this Court specifically rejected, namely, the repeal of common law rules of preclusion. Jones and Chief Wilder respectfully request that this Court reject Travers' invitation to overturn *Elliot*.

III. TRAVERS MADE VARIOUS MISSTATEMENTS OF FACT IN THIS CASE.

Travers has made various misstatements of fact in this case that the rules of this Court require Jones and Chief Wilder to address. Sup. Ct. R. 15(2). In addition to the misstatement of facts referenced in Travers' Statement of Facts, Travers makes a sinister assertion that "Jones did not soon forget Local 1492's support of one of his opponents." (Petitioner's Brief, p. 3). That assertion of fact is unsupported by any reference to the record of evidence before the trial court. It is intended solely for the purpose of adding a negative gloss to the facts of the case in the face of looming defeat and the termination of this litigation that the denial of Travers' Petition constitutes.

Travers attempts to impute to Jones some personal investment in the outcome of the picket by characterizing the pay plan that was the subject of the picket as "Jones new pay plan." (Petitioner's Brief, p. 3). In fact, the pay plan that was being implemented arose from the steps taken by a prior administration. Jones and Chief Wilder submit that Travers is attempting to distract this Court from the proper application of the law by alleging inaccuarate, inflammatory and extraneous "facts."

In his statement of facts to this Court, Travers claims that he shouted out "Vernon, Vernon. . . . " as a preface to the "familiar refrain" used on the picket line "Vernon, Vernon, what do we want? Equal pay for equal work. When do we want it? Now." (Petitioner's Brief, pp. 2-3). However, this account differs from Travers' sworn deposition testimony before the District Court. In the District Court's order on summary judgment, that court said "the plaintiff states that he attempted to draw attention to the picket by twice calling his name 'Vernon, Vernon.'" (Petitioner's App. D, 13a). Travers, by now asserting that the words "Vernon, Vernon" were used in the context of a chant, is attempting to narrow any perceived gap between his conduct and the exercise of First Amendment rights. Travers is attempting to change the facts before this Court by adding testimony that was not part of the evidence before either the District Court or the Eleventh Circuit.

CONCLUSION

WHEREFORE, because the Eleventh Circuit has properly interpreted the law and this Court's precedent, Respondents pray that this Court DECLINE to grant certiorari to review the decision of the Eleventh Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Appeal No: 02-14043-I

DEKALB COUNTY, GEORGIA, VERNON JONES, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS CHIEF EXECUTIVE OFFICER OF DEKALB COUNTY, GEORGIA; AND **SCOTT B. WILDER,** INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS FIRE CHIEF OF DEKALB COUNTY, GEORGIA,

Defendants/Appellant

v.

JAMES J. TRAVERS,

Plaintiff/Appellee

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
CASE NO. 1:01-CV-1734-RLV

AMENDED PETITION FOR REHEARING AND
REHEARING EN BANC ON BEHALF OF THE APPELLEE

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IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

DEKALB COUNTY, GEORGIA, VERNON JONES, Individually and in his Official Capacity as Chief Executive Officer of DeKalb County, Georgia; and **SCOTT B. WILDER**, Individually and in his Official Capacity as Fire Chief of DeKalb County, Georgia Defendants-Appellants, vs. **JAMES J. TRAVERS**, Plaintiff-Appellee.	**Appeal No.: 02-14043-I**

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In compliance with Federal Rule of Appellate Procedure 26.1 and 28(a), and Eleventh Circuit Rules 26.1-1, 26.1-2, and 26.1-3, the undersigned attorneys for the Appellee certify that the following persons and/or organizations have an interest in the outcome of this appeal:

1. DeKalb County, Georgia (Defendant-Appellant)
2. Charles G. Hicks (Attorney for Defendants-Appellants)
3. Vernon Jones (Defendant-Appellant)
4. William J. Linkous, III (Attorney for Defendants-Appellants)
5. William J. Atkins (Attorney for Plaintiff-Appellee)

6. Parks, Chesin & Walbert, P.C. (Attorneys for Plaintiff-Appellee)
7. A. Lee Parks (Attorney for Plaintiff-Appellee)
8. E. Charles Reed, Jr. (Attorney for Defendants-Appellants)
9. James J. Travers (Plaintiff-Appellee)
10. Honorable Robert L. Vinings (United States District Court Judge for the Northern District of Georgia)
11. Scott Wilder (Defendant-Appellant)
12. Melanie F. Wilson (Attorney for Defendants-Appellants)

STATEMENT REGARDING EN BANC CONSIDERATION

I express a belief, based on a reasoned and studied professional judgement, that the panel decision is contrary to the following decisions of the Supreme Court of the United States, precedents of this Circuit, and precedents of Georgia's appellate courts, and that consideration by the full court is necessary to secure and maintain uniformity of decisions in the Court:

U.S. v. Utah Construction & Mining Co., 384 U.S. 394, 86 S.Ct. 1545 (1966);

University of Tennessee et al v. Elliot, 478 U.S. 788, 106 S. Ct. 3220 (1986);

Carlisle v. Phoenix City Board of Education, 849 F. 2d 1376 (11th Cir. 1988);

Gjellum v. City of Birmingham et al, 829 F.2d 1056 (11th Cir. 1987);

Thornquest et al v. King et al, 82 F.3d 1001 (11th Cir. 1996);

Flournoy v. Akridge et al, 198 Ga. App. 86, 400 S.E.2d 649 (Ga. App. 1990).

I further express the belief, grounded in reasoned and studied professional judgement, that this appeal involves one or more questions of exceptional importance. The state of the law relating to the preclusive effect of unreviewed administrative decisions by municipal employers under Georgia law and its effect upon the continued viability of federal civil rights claims calls for an *en banc* decision reaffirming the rights of public employees to seek judicial review of constitutional violations by their public employers.

William J. Atkins
State Bar No. 027060
Attorney of Record

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STATEMENT OF THE ISSUES

I. Whether the factual conclusions in an unreviewed decision of an administrative hearing officer affirming disciplinary action against an employee by his municipal employer have preclusive effect under Georgia law in a concurrent 42 U.S.C. § 1983 claim?

II. Whether a municipal employer's administrative hearing process for review of disciplinary actions against employees meets the standards set forth in *University of Tennessee et al v. Elliot, supra,* where the hearing officer is selected by a named defendant in the underlying lawsuit, no compulsory process exists, and the scope of evidence is limited to matters relevant to the disciplinary action?

STATEMENT OF THE CASE

Appellee James Travers', [hereinafter "Travers"], filed his Complaint on June 29, 2001. Defendant DeKalb County and Appellants Jones and Wilder timely filed their Answers and, following discovery, a joint motion for summary judgement on March 18, 2002. [RI-14]. The District Court denied DeKalb County and Appellants summary judgment on all grounds on June 18, 2002. [R3-33].

DeKalb County filed a motion for reconsideration of the denial of summary judgment to the County. That motion was denied in an order dated August 22, 2002 [R3-44]. The Defendants then sought a certificate of immediate review of all issues raised in their motions for summary judgement, which the District Court also denied on August 22, 2002. [R3-44].

Defendants Jones and Wilder then filed this interlocutory appeal challenging the District Court's denial of qualified immunity on summary judgement. In a per curiam opinion, a panel of this Court reversed the denial of qualified immunity. The Panel concluded that the District Court was bound by the factual determinations of a DeKalb County hearing officer, thus effectively denying Travers any meaningful opportunity to litigate his First Amendment retaliation claims under 42 U.S.C. § 1983.

STATEMENT OF THE FACTS

A. Introduction.

Appellee James Travers, [hereinafter "Travers"], is a firefighter. He works for the DeKalb County Fire Department. He has an impeccable professional reputation among his superiors and his peers. [R-20, Prickett Aff'd]. Other than the retaliatory disciplinary action at issue in this case, Travers has never been disciplined by any employer, much less the DeKalb County Fire Department. [R-15, Travers Depo.]. Travers filed this case to clear his name and remove an undeserved blemish from his otherwise untainted reputation. This Petition asks the Court to preserve the only real avenue of redress available to a public employee in Georgia who faces retaliation by a public employer – a civil rights action under 42 U.S.C.§ 1983 action.

B. Statement of Facts.

Travers became a member of the DeKalb Professional Firefighters Local 1492, the local chapter of the International Association of Firefighters ("IAFF), shortly after starting his employment with DeKalb County, [R-15,

Travers Depo]. By the time the events at issue in this case came to pass, Travers held the positions of trustee for the Union. [R-15, Travers Depo.]. As a trustee, Travers conducted political action, including protests, for the Union.

In 2001, DeKalb County implemented a new pay classification system that resulted in gross pay disparities between the various ranks within the Fire Department. Under the new plan, many long term employees with higher ranks and more years of service were paid less than employees with lower ranks and less tenure. Members of the Union, including Travers, initiated a protest over the inequities in the new pay system in early Spring, 2001.

On May 14, 2001, Travers was participating in a peaceful protest of the pay system outside the Manual Maloof Administration Building in DeKalb County. Travers was holding a picket sign that read, "Equal Pay For Equal Work"/"Honk For Firefighters". [R-15, Travers Depo]. During the protest, Travers observed Defendant Jones by his first name. [R-15, Travers Depo]. Jones heard Travers call his name and became visibly angry. He turned to confront Travers and openly threatened him. Jones told Travers that he had no business being out picketing and that he was being an "insubordinate" employee. [R-15, Travers Depo; R-25, Karabeika Depo; R-20, Okonkwo Aff'd].

Appellant Scott Wilder, [hereinafter "Wilder"] is the DeKalb County Fire Chief. On May 17, 2001, Wilder suspended Travers for thirty (30) days without pay based on allegations of "Insubordination" and "Conduct Unbecoming On/Off Duty" based on a complaint from Jones' office, and that of other county administrators who were

accompanying Jones at the time of his confrontation with Travers.

On June 29, 2001, Travers filed the instant suit in District Court against DeKalb County, Jones and Wilder for violation of his constitutional rights under the First Amendment. [R-1]. *Four months* after Travers filed this lawsuit, an administrative hearing officer "selected from the Hearing Officer pool *established by the Chief Executive Officer*" convened a hearing to hear Travers' appeal of Wilder's disciplinary action. By rule, the Hearing officer is not bound by "strict courtroom procedures as is normal for a judicial hearing." The presentation of evidence is limited to matters relevant to the disciplinary action taken against the employee. The Department maintains the right to open and conclude the proceedings. At the request of the parties, the Merit System Director may notify only County employees that a party has requested their attendance as witnesses, but no witness may be compelled to attend the hearing. [R-20, Ex.B].

At the hearing, Travers was only able to offer his own testimony to rebut the representations of the Department's witnesses. The administrative hearing officer made the following findings regarding the exchange between Travers and Jones: As CEO Jones exited the building, Travers turned to him and repeatedly changed Jones's first name in a "loudly, menacing and taunting manner." CEO Jones approached Travers and asked whether he was a County employee. Travers acknowledged that he was a County employee exercising his rights as a citizen. CEO Jones told Travers that while he did not mind that Travers was exercising his rights, he would not tolerate Travers' insubordinate actions. Travers then said that he needed to take off his sunglasses so that he could look into CEO

Jones' eyes. CEO Jones repeated that he would not tolerate Travers' insubordinate actions and walked away. The hearing officer found that his findings did not indicate any non-job related factor or any errors of fact that would warrant reversal of the disciplinary action. [R-20, Ex. A, G, I].

As the District Court recognized, and as the panel of the Court noted, "there was a sharp conflict between the plaintiff and the defendants as to what transpired at that time. The district court properly determined that the merits of the case turn on whether the plaintiff's or the defendants' version of the facts is correct." The panel of the Court then concluded that Travers' was precluded from relitigating the factual determinations made by the administrative hearing officer and reversed the decision of the District Court. Travers now respectfully requests that the Court reconsider its determination in light of conflicting precedent and the grave consequences of its holding to civil rights litigation in the context of public employment.

ARGUMENT AND CITATION OF AUTHORITY

I. THE PANEL FAILED TO APPLY GEORGIA LAW GOVERNING THE PRECLUSIVE EFFECT OF THE FACTUAL CONCLUSIONS IN AN UNREVIEWED DECISION OF AN ADMINISTRATIVE HEARING OFFICER AFFIRMING DISCIPLINARY ACTION AGAINST AN EMPLOYEE BY HIS MUNICIPAL EMPLOYER.

The Panel, and preferably the Court *en banc,* should reconsider its decision at issue here because that decision failed to apply Georgia law governing the preclusive effect of factual findings reached by an administrative hearing officer in the context of public employment. The Panel

erroneously concluded that "[u]nder Georgia law, once an administrative body rules on questions of fact, the questions of fact are thereafter precluded from re-litigation." In fact, Georgia law differs according to the nature of the administrative body in questions and the procedural safeguards that exist at the administrative level to insure due process. As a result, the Panel's holding incorrectly turns on a erroneous conclusion of law critical to the outcome of this proceeding.

The controlling Georgia authority in cases involving an administrative hearing of a disciplinary action by a public employer instances is *Flournoy v. Akridge* et al, 198 Ga. App. 86, 400 S.E. 2d 649 (Ga. App. 1990). The Court of Appeals held that "the factfinding process in a Section 1983 action is unique to the cause of actions such that the appellant did not have the opportunity to litigate necessary facts and issues to that claim in an administrative hearing geared toward an entirely separate cause of action," namely, an administrative review of his termination by the Department of Community Affairs. *Flourney*, 198 Ga. App. at 88. The Court specifically considered the Supreme Court's decision in *Univeristy of Tennessee v. Elliot*, *supra*, and determined that its decision was not in conflict with that authority. As the facts in *Flourney* are directly on point here, the Court should reconsider its decision and conclude that the factual determinations of an administrative hearing officer in the context of an

employment decision should not have preclusive effect on a subsequent 42 U.S.C. § 1983 action.[1]

The Court should also reconsider the holding of the Panel for reasons of judicial economy. Travers filed this lawsuit four months before the administrative hearing. The logical effect of the Court's decision here is to prevent other plaintiffs, such as Travers, from using a concurrent administrative procedure that may afford a solution that reduces the need for federal litigation. Travers is being punished for seeking redress with his employer, even as he proceeded with this litigation. This Court recognized the value of encouraging multiple avenues of resolution in *Gjellum v. City of Birmingham et al*, *supra*, when the Court refused to extend *Elliot's* holding to "claim preclusion."

> [w]e conclude that the importance of the federal rights at issue, the ***desirability of avoiding the forcing of litigants to file suit initially in federal court rather than seek relief in an unreviewed administrative proceeding*** and the limitations of state agencies as adjudicators of federal rights override the lessened federalism concerns implicated outside the contours of the full faith and credit statute.

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[1] At a minimum, the Court of Appeal's decision in *Flourney*, conflicts with a recent decision of a different panel of the Georgia appellate court in *Jordan v. Board of Public Safety*, 253 Ga. App. 339, 559 S.E.2d 94 (Ga. App. 2002) cited by the Panel of this Court in its opinion. Counsel notes with regret, that due to excusable neglect, counsel failed to cite to the *Flourney* decision in Travers' initial Brief to the Court, despite having relied heavily on *Flourney* in Travers' Brief in Opposition to Summary Judgment.

Gjellum, supra at 1064. In the context of public sector employment discrimination, permitting "issue preclusion" on a critical issue of fact in a First Amendment case, i.e. the nature of the employee's speech, is tantamount to claim preclusion. Therefore, the Panel and the Court should reconsider application of issue preclusion in its decision granting qualified immunity to the defendants.

II. A MUNICIPAL EMPLOYER'S ADMINISTRATIVE HEARING PROCESS FOR REVIEW OF DISCIPLINARY ACTIONS FAILS TO MEET THE STANDARDS SET FORTH BY THE SUPREME COURT IN *UNIVERSITY OF TENNESSEE ET AL V. ELLIOT*.

In *University of Tennessee et al v. Elliot*, *supra*, the Supreme Court held that "[w]hen and administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, federal courts must give the agency's fact-finding the same preclusive effect to which it would entitled in the State's courts." The Panel erroneously concluded that the administrative hearing at issue in this case met the standard set forth by the Supreme Court in *Elliot*.

In doing so, the Panel relied on authority from outside this Circuit to conclude that employees are not entitled to compulsory process in an administrative hearing. Although that conclusion does not run afoul of any direct precedent in this Circuit, Travers respectfully submits that the decision is inconsistent with the Court's prior holdings in *Thornquest v. King*, 82 F.3d 1001 (11th Cir. 1996) and *Carlisle v. Phoenix City Board of Education*, 849 F.2d 1376 (11th Cir. 1988). The logical effect of the Court's

holding is to grant "claim preclusion" by allowing issue preclusion as to a critical element of Travers' underlying First Amendment claim. It is undisputed that Travers' First Amendment claim was not at issue before the administrative hearing officer; the only issue there was his conduct during the altercation with Appellant Jones. Much as in *Carlisle*, collateral estoppel should not apply to effectively end a employment discrimination claim because of a narrow, but critical, factual finding by an administrative body.

CONCLUSION

For the within and foregoing reasons, the Court should grant Travers' Petition and allow for rehearing *en banc*.

This ___ day of April, 2003.

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CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for the opposing party with a copy of the within and foregoing Amended Petition for Rehearing and Rehearing En Banc on Behalf of the Appellee by depositing a copy of

the same in the United States mail, postage prepaid, addressed as follows:

Melanie F. Wilson, Esq.
DeKalb County Law Department
1300 Commerce Drive, 5th Floor
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This ___ April, 2003.

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